Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF
ATX COMMUNICATIONS, INC.
BLACKFOOT COMMUNICATIONS, INC.
FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A BAYRING COMMUNICATIONS
CTC COMMUNICATIONS CORP.
FOCAL COMMUNICATIONS CORPORATION
GLOBALCOM, INC.
LIGHTSHIP TELECOM, INC.
MPOWER COMMUNICATIONS CORP.
NTELOS, INC.
ONEEIGHTY COMMUNICATIONS, INC.
RCN TELECOM SERVICES, INC.
TDS METROCOM, LLC

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Their Attorneys

October 4, 2004

Table of Contents

TABLE OF SHORT CITATIONS

CASES

USTA II	*United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)
Verizon	*Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)
New York	*New York & Public Service Com'n of New York v. FCC*, 267 F.3d 91, 102 (2nd Cir. 2001)
Illinois Pub. Telecomms. Ass'n v. FCC,	*Illinois Pub. Telecomms. Ass'n v. FCC,* 117 F.3d 555 (D.C. Cir. 1997);
Louisiana Pub. Serv. Comm'n	*Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986).

FCC AUTHORITIES

Interim UNE Order	*In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004)
TRO	*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003)
UNE Remand Order	*Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed

	Rulemaking, 15 FCC Rcd 3696 (1999)
Pricing Flexibility Order	*Access Charge Reform*, CC Docket No. 92-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999)

EX PARTES

Ad Hoc Users Sep. 13, 2004 *Ex Parte* Letter	Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Sep. 13, 2004)
Ad Hoc Users Report	Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed August 26, 2004) (attaching white paper entitled "Competition in Access Markets: A Reality or Illusion.")
Qwest Aug. 20, 2004 *Ex Parte* Letter	Letter from Cronan O'Connell, Vice-President-Federal Regulatory, Qwest, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 96-98, 98-147 (filed August 20, 2004)
SBC Aug. 18, 2004 *Ex Parte* Letter	Letter from Christopher M Heimann, General Attorney, SBC, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 96-98, 98-147 (filed Aug. 18, 2004)
Verizon Aug. 13, 2004 *Ex Parte* Letter	Letter from Dee May, Vice President-Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Aug. 13, 2004)
XO Aug. 11, 2004 *Ex Parte* Letter	Letter from Christopher T. McKee, XO to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-148 (filed Aug. 11, 2004)
Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter	*See* Letter from Andrew Lipman, Swidler Berlin Shereff Friedman, LLP, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 98-147, 96-98 (filed Aug. 9, 2004).
Verizon July 29, 2004 *Ex Parte* Letter	Letter from Dee May, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 98-147, 96-98 (filed

	July 29, 2004);
ALTS July 22, 2004 *Ex Parte* Letter	Letter from John Windhausen, Jr., President, ALTS, to Hon. Michael Powell, Chairman, FCC, Docket Nos. 96-98, 98-147, 01-338 (filed July 22, 2004)
Verizon July 19, 2004 *Ex Parte* Letter	Letter from Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Honorable Michael K. Powell, Chairman, FCC, CC Dockets Nos. 01-338, 96-98, 98-147 (filed July 19, 2004)
Verizon July 2, 2004 *Ex Parte* Letter	See Letter from Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 96-98, 98-147 (filed July 2, 2004)
Verizon June 24, 2004 *Ex Parte* Letter	Letter from Dee May, Vice President- Federal Regulatory, Verizon, to Marlene Dortch, Secretary FCC, CC Dockets Nos. 01-338, 96-98, 98-147 (filed June 24, 2004)

SUMMARY

USTA II provides an opportunity for the Commission to reformulate rules governing unbundled access to incumbent network elements in accordance with the key objective of the 1996 Act – promoting facilities-based competition. Congress correctly recognized that it is neither possible nor economically efficient for competitors to duplicate the incumbent network, and therefore sought to promote competition by requiring incumbents to provide unbundled access to their networks. The Commission should revalidate that appropriate access to unbundled network elements is consistent with, and promotes, the goals of the Act.

The Commission should begin by determining that the availability of special access service is essentially irrelevant to an impairment analysis. Most important, an environment in which competitors are limited to special access would not adequately protect against a price squeeze. The current regulatory regime governing special access has, to a very significant extent, removed special access from price cap regulation, thereby enabling incumbents to exploit customers by raising special access prices. Absent UNEs, there would be essentially no constraint on an incumbents' ability to increase special access prices, thereby subjecting competitors to a price squeeze. While this reason alone is sufficient to reject special access as playing a role in the impairment analysis, the Commission should also do so because BOC studies purporting to show CLEC reliance on special access are flawed and exaggerated, and because BOC unlawful policies have, as a practical matter, compelled CLECs to use special access in many instances, such as by Verizon's "no facilities" policy, BOC prohibitions on commingling, and refusal to provision EELs.

Although the Commission has chosen to reexamine in this proceeding unbundled access to both loops and transport, the evidence compiled since the *Triennial Review Order* reinforces that CLECs are impaired for all flavors of loops below OCn level lit. In particular, the evidence compiled in the state *Triennial Review* proceedings demonstrates that there are remarkably few instances in which the loop and transport triggers are met. BOC studies purporting to show that vast majority of connections purchased by CLECs are special access (which apparently includes IXC special access), proves that competitors are entirely dependent on incumbent ubiquitous networks to reach customers. In addition, the Commission's findings in the *Triennial Review Order* of impairment for loops and transport used to serve enterprise customers remain valid for all the reasons there stated by the Commission.

Accordingly, the Commission should dispense with triggers and establish a nationwide finding of impairment for DS1, DS3 and dark fiber loops and transport and the DS1 EEL. At a minimum, for DS3 and dark fiber loops, the Commission should establish a presumption of impairment subject to application of the *Triennial Review Order* triggers, which could be administered by the Commission on the basis of reporting on address and route deployment by competitive providers. For DS-3 and dark fiber transport, the Commission should adopt the proposal that we understand will be offered by ALTS in this proceeding. This proposal involves a three-tiered analysis based on wire center density. The overwhelming evidence of impairment gathered in state proceedings justifies a presumption of impairment pending application of triggers where the Commission may choose to employ them.

Apart from the above and for the reasons discussed in the comments, the Commission should conclude that:

- The qualifying service standards that were invalidated by *USTA II* should not be re-instated;
- CLECs may use unbundled network elements to provide any telecommunications service;
- CLECs may commingle, and ILECs must combine, Section 271 network elements;
- States may establish rates for Section 271 network elements;
- CLECs are impaired without access to, and reinstate, unbundled access to entrance facilities; and
- Incumbents are required to provide interconnection facilities as UNEs at TELRIC prices

The transition proposed in the *Interim UNE Order* where no impairment is found should not be adopted because the blanket six month transition period that would apparently apply to all UNEs is too broad. Instead, the Commission should establish separate transition periods for each UNE as appropriate. In addition, the Commission should permit CLECs to obtain network elements as UNEs during the transition period for new orders. This will avoid rate shock to CLECs and their customers and will not prejudice ILECs in the context of a transition to non-UNE status for a network element.

Finally, the Commission should rescind its exemptions for mass market broadband network elements. For reasons previously explained by CLECs in the *Triennial Review* proceeding, those exemptions were not justified in the first place for a number of reasons. ILECs have predictably reacted to these new rules by little more than demanding more relief, including abrogation of the fundamental bargain embodied in Section 217 of the Act. At a minimum, the Commission should initiate a new proceeding to reevaluate its broadband rules.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF
ATX COMMUNICATIONS, INC.
BLACKFOOT COMMUNICATIONS, INC.
FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A BAYRING COMMUNICATIONS
CTC COMMUNICATIONS CORP.
FOCAL COMMUNICATIONS CORPORATION
GLOBALCOM, INC.
LIGHTSHIP TELECOM, INC.
MPOWER COMMUNICATIONS CORP.
NTELOS, INC.
ONEEIGHTY COMMUNICATIONS, INC.
RCN TELECOM SERVICES, INC.
TDS METROCOM, LLC

ATX Communications, Inc.; Blackfoot Communications, Inc., Freedom Ring Communications, L.L.C. d/b/a BayRing Communications; CTC Communications Corp.; Focal Communications Corporation; Globalcom, Inc.; Lightship Telecom, Inc.; Mpower Communications Corp.; Ntelos, Inc.; OneEighty Communications, Inc.; RCN Telecom Services, Inc.; and TDS Metrocom, LLC (collectively "Commenters") submit these initial comments pursuant to the Commission's Notice of Proposed Rulemaking in the above-captioned proceedings.

I. THE ACT SEEKS TO PROMOTE COMPETITION THROUGH UNBUNDLING

In evaluating whether CLECs are impaired without unbundled access to network elements, the Commission must be guided by the fundamental goals of the Telecommunications Act of 1996 ("Act"). CLECs have already extensively described these goals to the Commission, and the Commission has noted them in previous decisions. While the Commission must necessarily address the specific issues raise by *USTA II*, those issues do not and cannot alter the Commission's more fundamental obligation to implement the key objectives of the Act in the manner prescribed by Congress.

First, the Commission must craft unbundling rules that promote a pro-competitive deregulated environment for the telecommunications industry. As the Supreme Court found in *Verizon*, the intent of the Act was to "uproot" traditional monopolies, promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises."[1] The Supreme Court cited to one of the main proponents of the Act, who noted that the purpose of the Act is to break up the BOCs' networks and make them available to competitors:

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out .... It is kind of almost a jump-start .... I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies

[1] *Verizon*, 535 U.S. at 475-476.

> network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[2]

Second, Congress intended access to unbundled network elements to be a cornerstone for its policy of promoting facilities-based competition. Section 271 of the Act serves to promote competition by requiring that the Bell companies provide access to their local networks as a condition of receiving in-region long distance authority. Section 271 establishes that the ILECs must unbundle key network elements as a continuing condition of providing inter-LATA long distance service.[3] For all practical purposes, the unbundling requirements in both section 251 and section 271 are the cornerstones of the Act's pro-competitive framework. Accordingly, while addressing the narrower issues raised by *USTA II*, the Commission may and should seek to promote competition by providing for appropriate unbundled access to incumbent network elements.

II. THE STANDARD FOR IMPAIRMENT

USTA II does not require modification of the impairment standard adopted by the Commission in the *Triennial Review Order*. That standard –whether lack of access to a network element would "pose[] an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic"[4] – may therefore be reaffirmed and used in this proceeding.[5]

---

[2] *Verizon,* 535 U.S. at 488 (citing 141 Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub.L. 104-104 (1995)).

[3] 47 U.S.C. § 271(c)(2)(B).

[4] *TRO,* ¶ 84.

[5] *See generally USTA II,* 359 F.3d at 571-573.

However, the court indicated that the standard should be clarified to specify "uneconomic by whom."[6] To address the D.C. Circuit's request, the Commission could clarify that the economic test for impairment is to be measured in the context of a reasonably efficient competitor. The Commission should not adopt any narrower construct -- to limit UNE access to only the "hypothetically most efficient competitor" using only "the most efficient technology available" could result in unbundling available in theory but never in practice. Congress did not adopt the Act to engage the Commission in theoretical exercises – it adopted the Act "to promote competition,"[7] and it ordered the Commission to implement its unbundling regulations within six months so that such competition could be realized as quickly as possible.[8]

Therefore, in this proceeding, the Commission should order unbundling where lack of access would pose an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic by a reasonably efficient competitor.

III. CONSIDERATION OF SPECIAL ACCESS DOES NOT ALTER THE RESULT OF THE COMMISSION'S IMPAIRMENT ANALYSES

A. The Act Poses Whether CLECs Are Impaired *Without* the Network Elements the ILECs Use to Provide Special Access

USTA II required the Commission on remand to consider the availability of special access as a factor in its impairment analysis.[9] In response, it is imperative that the Commission better

---

[6] *USTA II*, 359 F.3d at 572.

[7] Preamble, Telecommunications Act of 1996. The Commission previously noted in attempting to define impairment that this preamble "gives the best snapshot of Congress's overall intent in enacting the 1996 Act." *TRO*, ¶ 70.

[8] 47 U.S.C. § 252(d)(1).

[9] *USTA II*, 359 F.3d at 577.

explain why inclusion of special access services in the impairment equation would be illogical and would violate the instructions of the Act.

Past Commission orders have first determined whether a requesting carrier is impaired without access to an element of the ILEC's network *at any price.*[10] If impairment is found, then that element must be unbundled at cost-based rates pursuant to section 252(d)(1).[11] This ordering is accordance with the Act, which prescribes an "if impairment – then TELRIC" analysis. The Act instructs the Commission to require unbundling of network elements where "*the failure to provide access* would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[12] Where competitors are impaired *without any access to the ILEC networks*, then in order to drive down retail telecommunications prices toward actual cost, Congress intended competitors to be assured such access at cost-based rates [*i.e.* TELRIC]."[13] Only this formula can assure that, where competition relies on access to the legacy incumbent networks, the prices paid by *consumers* do not remain inflated as a result of incumbent pricing (whether retail or wholesale) that does not reflect the incumbent's actual ongoing costs.

---

[10] Even the *USTA II* court agreed that price is not a factor. "The question is … what the relevant benchmark is for assessing whether entry is "impaired" if non-ILECs don't have access to UNEs (*at whatever rate the Commission might choose to prescribe*)." (emphasis supplied). *USTA II,*359 F.3d at 577.

[11] As Commissioner Copps stated, "impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit." *Interim Order*, Separate Statement of Commissioner Copps.

[12] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

[13] 47 U.S.C. § 252(d)(1).

The court's concept that competitors may not be impaired if they could purchase special access services from the incumbents misses the point of the Act. The Act was not designed just to draw competitors into the market; it was designed to promote competition "*in order to* secure lower prices and higher quality services for American telecommunications consumers."[14] If competitors could enter the market only by purchasing special access, and did not have other viable alternatives, then ILEC and CLEC retail rates would remain inflated to the extent that special access rates exceeded costs. CLECs would be unable, and ILECs unwilling, to create sufficient downward pressure on retail rates to assure Congress' ultimate objective of lower prices for consumers. Congress was well aware of the availability of special access prior to the Act and therefore accounted for the availability of such facilities when drafting the impairment, unbundling, and pricing provisions of the Act. Given the ultimate objective of lower retail prices, it is clear then that Congress intentionally and logically excluded the availability of special access from the impairment equation.

As the Commission is well aware, "special access" is not an "alternative" to ILEC loops and transport, but is simply an ILEC service offered over these same network elements.[15] If the Commission deems special access as an alternative to itself and thereby immunized ILECs from cost-based pricing of elements on which competitors must rely, it would be putting the "cart before the horse" in a manner that would undermine the true purpose of the Act.

---

[14] Preamble, Telecommunications Act of 1996 (emphasis added).

[15] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587, 9603 (2000) (stating that the conversion of special access circuits to UNE status "should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.").

B. Special Access Does Not Adequately Protect Against a Price Squeeze

ILECs have the ability and the incentive to discriminate against CLECs. Under current rules, ILECs enjoy pricing flexibility for special access in many metropolitan areas (MSAs). In these markets, under price cap regulations, ILECs are exempted from providing any cost justification for the rates they charge for special access facilities. In these markets in particular, rates for special access have generally increased over the years to amounts unreasonably in excess of cost.[16] The Commission has recognized that "in recent years, incumbent LECs operating under price caps have enjoyed historically high rates of return. For instance, in 2001, interstate rates of return for BellSouth, Qwest, SBC, and Verizon were approximately 19%, 22%, 21.5%, and 17%, respectively."[17]

Although the Commission has the legal authority to prevent price squeezes and discriminatory pricing, one of the purposes of the Act was to create self-executing market pressures from UNE-based competition that would reduce the need for active policing by the Commission. Moreover, the Commission in recent years has not demonstrated an appetite to engage in the level of market supervision that would be necessary to protect consumers if competition were left to rely on special access, such as the risk of price squeeze and discrimination. *USTA II* asked the Commission to assess the risks associated with reliance on special access.[18] The potential for a price squeezing and discriminatory pricing, especially in MSAs that have qualified for pricing flexibility, is an obvious risk that by itself requires the

---

[16] *See, e.g.*, Ad Hoc Users Report at 27-40.

[17] Verizon Petition for Emergency Declaratory and Other Relief, WC Docket 02-202, Policy Statement, FCC 02-337, 17 FCC Rcd 26884 ¶ 18 (2002)

[18] *USTA II*, 359 F.3d at 577.

Commission to conclude in its impairment analysis that special access is not a viable alternative to UNEs.

C. Alleged Evidence of CLEC Use of Special Access Is Irrelevant, Exaggerated and Misleading

Prior to the release of the NPRM, the RBOCs submitted reports that they argued demonstrated that CLECs are not impaired without access to high capacity loop and transport facilities.[19] The RBOC reports purport to show that competitors are using special access facilities to compete successfully. In the first place, these studies are irrelevant, as explained above, for the determination of whether CLECs are impaired without access to ILEC network elements. If anything, CLEC use of special access, to the extent it exists, is itself indirect evidence that they are otherwise impaired. The RBOC data, if accurate, would demonstrate that competing carriers have been unable to obtain alternatives to special access through self-provisioning or third-parties.

But even if such data were deemed relevant, the Commission should be skeptical of recent supposed evidence presented by the RBOCs of current reliance by CLECs on special access. For example, recent *ex parte* submissions by Verizon[20] are so unexplained and unsupported in critical respects as to be virtually meaningless. Verizon's data appear to combine CLEC and IXC demand, thereby vastly inflating the supposed use of special access by

---

[19] *See* Verizon July 2, 2004 *Ex Parte* Letter at 2, & Attachment 1, 17-19; Verizon June 24, 2004 *Ex Parte* Letter at 2 (letter to FCC Chairman and Commissioners) & Attachment 1, at 9; SBC Aug. 18, 2004 *Ex Parte* Letter at 1; Qwest Aug. 20, 2004 *Ex Parte* Letter at 3.

[20] Verizon July 29, 2004 *Ex Parte* Letter at 2.

unidentified "CLECs."[21] The lack of clarity provided by Verizon in this filing renders its reported data meaningless.

But more importantly, nothing in the RBOCs' data shows the number of customers that CLECs have been unable to serve economically with special access. Whatever the true number of customers CLECs now serve with special access, the ILECs continue to dominate nearly all sectors of the wireline local telecommunications market.

D. The Commission Should Not Reward the Discriminatory and Unlawful Tactics the ILECs Have Used to Block Access to UNEs

The ILECs have repeatedly frustrated and delayed CLEC attempts to obtain UNE loops and transport.[22] Where economically possible, CLECs have in some of these instances ordered special access in order to meet the demands of their customers rather than forego a customer. If the Commission relied on this evidence of CLEC use of special access, it would be rewarding the ILECs for their UNE provisioning failures. Examples where ILECs have refused to provide UNEs but would offer special access include:

- Refusal to provide UNEs if even routine modifications were necessary to fill the order.[23]

---

[21] ALTS July 22, 2004 *Ex Parte* Letter at 4-5. In its July 29th *ex parte,* Verizon provided estimates of CLEC special access use, excluding use by its two largest special access customers. *See* Verizon July 29, 2004 *Ex Parte* Letter at 2. However, the information provided by Verizon was not clear in as much as it was not apparent whether these two special access users are among the seven unnamed CLECs in its other filings. Also, Verizon has also failed to identify its consultants that collected the information or where they obtained the information presented. In addition, Verizon has not explained key terms such as "CLEC Lit Building." It is conceivable that the term includes CLECs using UNEs or even cable operators providing cable modem service.

[22] *See, e.g., Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, 16 FCC Rcd 20641 (2001).

[23] TRO, ¶¶ 632-641, n.1939 (in discussing Verizon's practice of offering to provide retail service or special access but not UNEs when routine modifications are required, the Commission wrote, "We find this policy to be discriminatory on its face.").

- Refusal to provide UNE loop-transport combinations during periods when the rules were stayed or were still being implemented or re-implemented.[24]
- Refusal to allow CLECs to commingle UNEs with tariffed services.[25]

E. CMRS Providers Are Irrelevant to Wireline CLEC Impairment

Even to the extent that the availability of special access is deemed relevant, any finding concerning CMRS providers use of special access is not transferable to CLECs. The competitive realities of the wireline and wireless markets are substantially different and should therefore be evaluated separately.

For all these reasons, in response to the *USTA II* direction to consider special access, the Commission should conclude that CLECs are impaired without access to UNEs notwithstanding the availability of the same network element at a higher price as special access.

IV. CLECs ARE IMPAIRED WITHOUT UNBUNDLED ACCESS TO DS1 LOOPS, DS1 DEDICATED TRANSPORT, AND EELs

A. The Commission's General Findings in the *TRO* that CLECs are Impaired Without Unbundled Access to DS1 Loops and DS1 Dedicated Transport Remain Valid

In the *TRO*, the Commission unanimously supported the continued availability of unbundled access to DS1 loops and DS1 dedicated transport (combination of which make a DS1 EEL) on a nationwide basis. The Commission found impairment because the record made clear that self-provisioning such facilities was not an option and there was little evidence of

---

[24] The existing-combination rules, after having been stayed by the Eighth Circuit in 1996, were reinstated by the Supreme Court in 1999; and the *TRO* reinstated the new-combination rule in August 2003. These determinations, moreover, did not have an immediate practical impact because ILECs delayed implementing them. The Commission has an extensive record in this proceeding, the *UNE Remand Proceeding*, and various rocket docket proceedings that detail the ILECs' failures to make combinations available.

[25] *See* Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter, at 3.

competitive wholesale alternatives.[26] In fact, the evidence of impairment at the DS1 capacity level was so compelling that the Commission chose not to delegate to the states the authority to consider DS1 loop or DS1 transport impairment based on a self-provisioning trigger.[27] Nothing has changed to warrant anything less than a finding that carriers are impaired in serving enterprise customers without unbundled access to DS1 loop and transport facilities.

1. DS1 Loop Impairment

Although the Commenters steadfastly maintain that the Commission's DS1 loop rules were not vacated by *USTA II*, the Commission should reaffirm these rules in this proceeding to dispel any uncertainty regarding the ILECs' obligations to unbundle these facilities.[28]

a) Self-Provisioning is Not an Option

Like the FCC's findings in the *TRO*, there is "little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving customers at the DS1 level."[29] Carriers seeking to serve DS1 enterprise customers still "face extremely high economic and operational barriers in deploying DS1 loops to serve these

---

[26] *TRO*, ¶¶ 325-27 & 390-92.

[27] *TRO*, ¶¶ 327, 334, 391, & 409.

[28] *USTA II* stated that it was only vacating the findings of impairment for switching and transport. *USTA II*, 359 F.3d at 594.

[29] *TRO*, ¶ 325; *see* Declaration of Mark A. Jenn, TDS Metrocom, LLC (provided in Attachment A) at ¶¶ 11, 13 ("TDS Metrocom Declaration") (attesting that TDS Metrocom has never self-provisioned loop facilities at a DS1 level and a wholesale market for DS1 loops does not exist); Declaration of Brent Johnson, OneEighty Communications, Inc. (provided in Attachment B) at ¶ 5 ("OneEighty Declaration") (attesting that OneEighty is economically unable to self-deploy single DS1 capacity loops to a majority of its customers, and OneEighty has found no evidence of any carriers offering wholesale access to DS1 loop facilities in its markets other than the ILEC, Qwest); Declaration of Steven A. Wengert, BayRing Communications (provided in Attachment C) at ¶ 7-15 ("BayRing Declaration").

customers."[30] It continues to be the case that it makes no economic sense for a competitive carrier to "construct its own DS1 or lower capacity loops" because "[c]ustomers demanding services over DS1 loops possess significantly different economic characteristics for competitive carriers than large enterprise market customers."[31] In particular, small and medium-sized enterprise customers served by DS1 loops still "provide much lower revenue opportunities than large enterprise market customers and, generally, resist long-term contract obligations."[32] These customers continue to have "a greater potential to change providers on a more frequent basis, *i.e.*, churn, resulting in the inability of competitive LECs to rely on a long-term DS1 revenue stream, as they can with much higher loop capacity demands."[33]

Consistent with the *TRO*, the Commission's self-provisioning impairment finding should rely most heavily on the economic feasibility of competitive LECs to self-deploy and recover sunk costs.[34] In that regard, the fact still remains that it is "economically infeasible for competitive LECs to deploy DS1 loops, which require the same significant sunk and fixed construction costs as higher capacity loops."[35] Typically, CLECs are still unable to "recover sunk costs in self-deploying DS1 loops" and face "other economic and operational barriers ... in self-deploying loops generally, *e.g.*, the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and bringing it into a building thereafter, as well as convincing customers to accept the delays and uncertainty associated with

---

30 *TRO*, ¶ 325.

31 *TRO*, ¶ 325; *see* OneEighty Declaration, ¶ 7.

32 *TRO*, ¶ 325; *see* OneEighty Declaration, ¶ 7.

33 *TRO*, ¶ 325; *see* OneEighty Declaration, ¶ 7.

34 *TRO*, ¶ 325; *see* BayRing Declaration, ¶¶ 7, 8,10 & 11; TDS Metrocom Declaration, ¶ 11.

35 *TRO*, ¶ 325; *see* OneEighty Declaration, ¶¶ 5, 7.

deployment of alternative loop facilities exist with DS1 loop self-deployment."[36] Notably, while some CLECs in some instances have self-provisioned loops where they can assemble enough customers in a concentrated area to make self-provisioning feasible, because the customers cannot all be signed up at the same time, it would have been infeasible for CLECs to build their own loops if they did not have the ability to first build a critical mass of customers through the leasing of the ILEC's DS-1 loops.[37] Further, it continues to be infeasible for CLECs to absorb the additional "costs" associated with such economic and operational barriers over time especially at lower loop capacity levels and these "barriers impact the ability to self-deploy at a DS1 level to an even greater extent than at higher loop capacity levels."[38]

b) No Suitable Competitive Wholesale Alternatives for DS1 Loops Exists

With respect to competitive wholesale alternatives for DS1 loop facilities, the record still has "little evidence" that such last-mile alternatives exist.[39] CLECs are still impaired without unbundled access to DS1 facilities because viable wholesale alternatives are only available on a *de minimus* basis. In fact, there are an estimated three million buildings in the United States that ILECs serve and the record reveals that CLECs provide alternative facilities to only one percent of them at most.[40] Evidence shows that alternative competing providers remain confined to a

---

[36] *TRO*, ¶ 326.

[37] BayRing Declaration, ¶¶ 10-12; *see also TRO*, ¶ 576.

[38] *TRO*, ¶ 326 (citing paragraph 315 of the *TRO* that discusses the ability to absorb these costs at the OCn loop level).

[39] *TRO*, ¶ 327.

[40] Ad Hoc Users Report at 16.

small number of buildings in a small number of concentrated business districts.[41] Even though some "large users" requirements fall within those highly concentrated urban areas, many major companies have networks that connect, in some cases, tens of thousands of individual sites- the vast majority of which are areas where the ILEC is the only source of connectivity.[42] Indeed, the overwhelming majority of such smaller locations are "nowhere near" any central business districts or concentration of CLEC facilities.[43]

In the *TRO*, the FCC even recognizes that competitive alternatives are far from universally available and found that:

> When competitive LECs self-deploy fiber they predominantly do so at the OCn-level.... In contrast, the record contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops. As for DS3 loops, evidence of self-deployment and wholesale availability is somewhat greater than for DS1s and is directly related to location-specific criteria. Indeed, competitive LECs agree that at a three DS3 loop capacity level of demand, it is economically feasible to self-deploy....[44]

---

[41] Ad Hoc Users Report at 12; *see* BayRing Declaration, ¶ 9 ("In its markets, BayRing has found no evidence of any carriers offering wholesale access to loop facilities."); *id.* at ¶ 14 ("at locations where BayRing has overbuilt local loops at extremely high capacity levels, BayRing does not offer wholesale access to these facilities" because "the costs of developing the systems and processes necessary to facilitate a wholesale product are prohibitive when viewed in relation to the small number of locations where BayRing has overbuilt."); TDS Metrocom Declaration, ¶ 9 ("Out of the downtown area of major metropolitan areas, the TDS CLECs have found no evidence of carriers offering wholesale access to loop facilities."); One Eighty Declaration, ¶ 5 ("One Eighty has found no evidence of any carriers offering wholesale access to loop facilities in our markets other than Qwest.").

[42] *Id.* at 12. Noting that a bank network would typically serve hundreds or thousands of branches and thousands or tens of thousands of ATMs; an airline network would have connections to tens of thousand of travel agents; an automobile manufacturer's network would provide service to thousands of auto dealerships. *Id.* at n.16.

[43] Ad Hoc Users Report at n.16.

[44] *TRO*, ¶ 298; *see also TRO*, ¶¶ 205-206.

The fact remains that even though CLECs have deployed limited amounts of fiber along major streets in concentrated business districts, those facilities are only physically connected to a small fraction of the buildings they pass.[45] This is due to the fact that the cost to establish a connection is tremendous and can only be incurred in the limited situations where the actual or potential demand in a specific building is sufficiently large enough such that the costs associated with establishing the connection can realistically be recovered.[46]

Evidence recently submitted by Verizon, SBC, and Qwest in this proceeding fully illustrates and substantiates the extent of enterprise customers' "significant and utter" dependence upon the facilities of these RBOCs, even in areas that are considered the most competitive local service markets in the country.[47] In these filings, these RBOCs provided maps purporting to display locations of enterprise customers being served by CLEC-owned facilities. Conspicuously missing from these maps is information regarding the nature and type of the facilities that are offered, OCn, DS3, or DS1. Notably, just because a CLEC may offer OCn does not mean that it offers DS1 facilities and quick presumptions cannot be made in that regard.[48] Further, the fact that a minuscule fraction of locations are being served by CLEC-owned facilities in no way diminishes a RBOC's "absolute monopoly at all locations where no

---

[45] Ad Hoc Users Report at 13.

[46] *Id.* at 13.

[47] *Id.* at 13; *see, e.g.,* Verizon June 24, 2004 *Ex Parte* Letter, Attachment 1, at 9; SBC Aug. 18, 2004 *Ex Parte* Letter at 1-2; Qwest Aug. 20, 2004 *Ex Parte* Letter at 3.

[48] *TRO*, n.1216 & n.1218.

alternative facilities are in place or at locations at which customer demand is insufficient to make CLEC entry economically feasible."[49]

If one takes the facilities deployed by CLECs, cable, and fixed wireless into account, a conservative estimate is that 98% of commercial buildings are not accessed by alternative facilities.[50] AT&T states that of the 186,000 buildings it serves only 5 percent are served with its own facilities or that of an alternative provider and the rest are provisioned by the ILEC.[51] Sprint likewise relies upon the ILECs for more than 93% of its needs.[52]

CLECs, like AT&T and Sprint, typically seek out opportunities to purchase service from other CLECs (rather than from ILECs) so as to expand the number of buildings where they can bypass ILEC facilities.[53] AT&T has done so and uses CLEC facilities or approximately 3,700 of the approximately 14,000 locations where such facilities are available.[54] AT&T is reluctant, however, to purchase CLEC access facilities, even where they exist[55] and has noted that IXCs that depend upon CLECs for special access often confront a level of uncertainty that threatens to impair their continuing use of such competitive alternatives. According to AT&T, more than half of the buildings for which CLEC special access was available are served by CLECs that have declared bankruptcy.[56] Not surprisingly, large users, who cannot afford service disruptions,

---

[49] Ad Hoc Users Report at n.19.

[50] *Id.* at 16.

[51] *Id.* at 17.

[52] *Id.* at 17.

[53] *Id.* at 18.

[54] *Id.* at 18.

[55] *Id.* at 18.

[56] *Id.* at n.32.

often direct their primary IXC to avoid obtaining access links from potentially unreliable and unstable, bankrupt CLECs. Moreover CLECs are sometimes unable to obtain the building owners' permission to place equipment in the building's common space, so that in many instances access is limited to a "fiber to the floor" arrangement in which only certain floors in the building can be served.[57] "Thus even where there is competitive special access in a building, there is not always competitive special access available to serve all the customers in that building."[58]

End users have similar reservations and concerns. Ad Hoc Users have found that viable competitive alternatives to the ILEC's DS1 services were available in less than ten percent (10%) of their locations.[59] Ad Hoc Users also noted the specific criteria they consider in determining whether they can use a competitive carrier at those locations if one is available. Specifically, they stated that:

> Service quality, reliability, and security are all critical issues that business end users must consider when evaluating competitive alternatives to the ILEC's broadband service offerings. CLEC network ubiquity and price are two other interrelated issues. Because CLEC networks are not as ubiquitous as those of the incumbents, many business service locations seeking broadband services from a CLEC either require (1) additional build-out by the competitor, or (2) "backhauling" of access to the CLEC POP (at the customer's expense). Either outcome increases the cost of service as compared to the ILEC, creating additional barriers for CLEC efforts to penetrate the business end user market.[60]

---

[57] *Id.* at n.32.

[58] *Id.* at n.32 (citing Declaration of Kenneth Thomas on Behalf of AT&T, at 2 & 4).

[59] *Id.* at 20.

[60] *Id.* at 21.

In the end, "issues of total cost, network integration, reliability, and responsiveness ultimately determine whether a competitor's service is considered by an end user to be a viable alternative in the first place."[61] Indeed, just because there may be competitors in a given market, the services provided by them are compared with those offered by the ILEC and "must satisfy the customer's standards for purchase and use."[62] Because of these considerations, CLEC services "rarely" meet the Ad Hoc members' needs and as such, "it is clear that the business data service market is far from being effectively competitive...."[63]

As a result of the lack of wholesale alternatives shown above, RBOCs have exploited their dominant position in the marketplace. Indeed, RBOCs fully recognize the lack of competitive alternatives and have increased special access prices after being given pricing flexibility in those markets where they convinced the Commission that competition was realized. For instance, Qwest's price for special access DS1 circuit (10 mile length) was $410 under the price cap unit price; however, since it received pricing flexibility, Qwest has increased the price to $602.[64] This is an astronomical 50% price increase in less than two years.

If the marketplace were truly competitive, ILECs would be forced by competitors to lower prices, would not have the market power to increase them. However, since that is not the case, RBOCs have every incentive to exploit their market power and increase rates as they have done. Taken as a whole, this evidence fully reveals that competitive alternatives remain

---

[61] *Id.* at 21.

[62] *Id.* at 21.

[63] *Id.* at 21.

[64] Ad Hoc Users Sep. 13, 2004 *Ex Parte* Letter, Attachment 1.

nonexistent or nascent in all marketplaces (including those where the RBOCs have been granted pricing flexibility) and that CLECs remain impaired without access to unbundled DS1 facilities.

2. DS1 Dedicated Transport Impairment

CLECs continue to be impaired without unbundled access to DS1 dedicated transport. As the *TRO* found with respect to DS1 transport, CLECs still "cannot self-provide DS1 transport" and are "impaired without access to DS1 capacity transport" because of "the high entry barriers associated with deploying or obtaining transport used to serve relatively few end-user customers and the lack of route-specific evidence showing sufficient alternative deployment."[65] The fact still remains that,

> A carrier requiring only DS1 capacity transport between two points typically does not have a large enough presence along a route (generally loop traffic at a central office) to justify incurring the high fixed and sunk costs of self-providing just that DS1 circuit. This is because a requesting carrier in need of DS1 capacity transport faces the same fixed and sunk costs as other carriers deploying transport or using alternatives, but faces substantially higher incremental costs across its customer base than a carrier requesting higher capacity transport.[66]

Furthermore, similar to the *TRO*'s record, the record still indicates that, "although competitive fiber has been deployed in many areas, DS1 transport is not generally made

---

[65] *TRO*, ¶ 390-91; *see* BayRing Declaration, ¶ 17 (at cost of $168,000 per mile, plus costs of right of way permitting, police details or flaggers that may be required, and the fiber itself, self-provisioning is uneconomical); TDS Metrocom Declaration, ¶ 14 ("TDS CLECs have found that it can cost up to $20 - $30 per foot and up to $150,000 per mile to lay fiber. Added to that is the cost of obtaining franchise or right of way agreements which can be as high as $10,000 and ongoing right of way fees that in some cases have been as high as $0.20 - $0.30 per foot, per year. This presents a significant hurdle that must be overcome to recoup investment in facilities. Therefore, there are many areas where self-provisioning interoffice transport is clearly inefficient and uneconomical.").

[66] *TRO*, ¶ 391 (footnotes omitted); *see* BayRing Declaration, ¶ 17, 19; One Eighty Declaration, ¶ 5; TDS Metrocom Declaration, ¶ 14.

available on a wholesale basis...."[67] The market for competitive wholesale DS1 transport remains "nascent, even where higher capacity competitive transport is already made available on a wholesale basis" and there have been no "technological advances [that] may allow this market to become practical."[68] Moreover, RBOC abuse of the pricing flexibility that has been granted to them, as discussed previously, is writing on the wall that there is little, if any, competitive wholesale alternatives for DS1 transport.

In short, the decision and record in the *Triennial Review Order* that definitively establishes a nationwide impairment for DS1 loops and transport remains fresh. The Commission may continue to rely on it as it is bolstered by recent evidence filed to justify or readopt a determination that CLECs are impaired without access to such UNEs.

---

[67] *TRO*, ¶ 392 & n.1216 (explaining that "While it is relatively common for carriers to obtain wholesale transport at higher capacities, we have very limited evidence of carriers using alternative DS1 transport. AT&T 'almost never' uses non-incumbent LEC facilities for its DS1 transport while it uses non-incumbent LEC facilities a substantially higher percentage of its DS3 transport.") (citing AT&T Comments at 149-50 (citing confidential data); Cbeyond Nov. 22, 2002 Transport *Ex Parte* Letter, Declaration of Richard Batelaan at para. 11 (concluding that "alternative providers for DS1 level transport are at best nascent"); NuVox *et al.* Comments, Affidavit of Edward J. Cadieux (NuVox Cadieux Aff.) at para. 9 (where "third-party providers exist they either do not offer dedicated transport at the DS1 level (only at the DS3 level or higher) or that operational interfaces at the DS1 level are too problematic for third-party providers to be a viable facility source."); ALTS/CompTel Oct. 28, 2002 Transport *Ex Parte* Letter at 3 (stating that competition at the DS3 capacity level does not equate to competition for DS1 transport)). *See* BayRing Declaration, ¶ ¶ 5, 9-16; One Eighty Declaration, ¶ 5; TDS Metrocom Declaration, ¶ 14.

[68] "Competing transport providers would have to install additional multiplexing equipment and refine back office systems to handle DS1 interoffice wholesale transport." *TRO*, n.1218 (citing KMC Duke Aff. at para. 13; NuVox Cadieux Aff. at para. 9 (where "operational interfaces at the DS1 level are too problematic for third-party providers to be a viable facility source"); Eschelon Kunde Aff. at para. 11 (describing the costs associated with using multiple transport vendors including the added complexity of managing multiple contracts, ordering processes, maintenance processes, and bills)).

B. Substantial Evidence Supports a Conclusive and Irrebuttable Finding of Impairment for DS1 Loops and Dedicated Transport

Although the Commission decided to apply the wholesale impairment trigger to DS1 loops and dedicated transport, it apparently did so out of an abundance of caution because the evidence clearly did not justify taking that approach – nor does it again. As indicated above, the Commission specifically recognized in the *TRO* that the record had "little evidence" that such last-mile competitive DS1 wholesale alternatives exist.[69] It also concluded that the wholesale trigger for DS1 transport was "not likely to have an immediate impact" and that its decision to apply the wholesale test to DS1 was based solely on the possibility that "technological advances may allow [a DS1 wholesale transport] market to become practical" in the future. [70] The Commission explained that the DS1 wholesale test was adopted based purely on this "predictive judgment."[71]

As previously demonstrated, wholesale DS1 loops and dedicated transport are unavailable in virtually every market. This is unsurprising given the entry barriers associated with constructing such facilities. In light of this substantial and compelling evidence, it would be a waste of the Commission's scarce resources to apply wholesale triggers to facilities for which there is no reason to believe there is any significant competition from *any* competitors, let alone multiple competitors in a market. Moreover, application of the triggers in an attempt to unearth the few isolated locations where competitors offer wholesale DS1 loops or transport runs counter to the D.C. Circuit's admonition that the Commission adopt a "sensible definition of the markets

---

[69] *TRO*, ¶ 327.

[70] *TRO*, ¶ 392 & n.1219.

[71] *TRO*, ¶ 392.

in which deployment is counted."[72] Indeed, there is nothing sensible about applying a trigger when the evidence overwhelmingly proves otherwise. The Commission should therefore adopt a conclusive and irrebuttable finding of national impairment for DS1 loops and transport.

C. DS1 EELs Should be Treated as a Separate UNE or Available to the Extent There is DS1 Loop Impairment

In the *TRO*, the Commission recognized the importance that access to EELs plays in fostering facilities-based competition and innovation. The FCC expressly stated that "[b]ased on the record before us, we conclude that EELs facilitate the growth of facilities-based competition in the local market" and allow carriers to economically serve many more customers and promote "self-deployment of interoffice transport facilities."[73] The Commission further found that EELs promote innovation "because competitive LECs can provide advanced switching capabilities."[74] The same holds true today and DS1 EELs are critical in bringing cutting edge innovation, feature rich service offering, and dynamic high capacity DS1 services to small and medium sized business customers.[75]

The Commission declined in the *TRO*, however, to designate EELs as additional UNEs for which an impairment analysis is necessary.[76] Instead, the Commission viewed EELs as

---

[72] *USTA II*, 359 F.3d at 574.

[73] *TRO*, ¶ 576.

[74] *TRO*, ¶ 576.

[75] *See* One Eighty Declaration, ¶ 9 ("In order to serve multi-location businesses and rural customers with required integrated voice and data products, access to high capacity EELs is the only way competitors like One Eighty can address that market."); TDS Metrocom Declaration, ¶ 15 (attesting that loop and transport combinations are critical to the success of the TDS CLECs because it is uneconomical to build widespread regional network footprints identical to those of the RBOCs in order to serve small and medium size businesses in areas outside the major metropolitan markets.).

[76] *TRO*, ¶ 575.

"UNE combinations consisting of unbundled loops and unbundled transport."[77] The Commission explained that to the extent "DS1 transport facilities are available along a specific route, for example, the incumbent LEC must provide (upon request) a DS1 EEL consisting of unbundled loop and unbundled transport facilities to any requesting carrier that qualifies for access to that combination."[78]

If the Commission makes a rebuttable finding of impairment for DS1 loops and transport, the Commission should not treat the availability of a DS1 EEL as being based on the sum of the parts (*i.e.,* impairment must exist on both the loop and transport routes of the combination). Determining the availability for a DS1 EEL in this regard is inappropriate and fails to recognize that CLECs may still be impaired if there is a non-impairment finding on the loop or transport portion of the combination or both.

For instance, if the Commission finds that CLECs are not impaired without access to a DS1 loop at a certain location because the DS1 loop wholesale trigger is satisfied, that does not necessarily mean that the competitive wholesale loop providers that satisfy the trigger will also provide alternative wholesale DS1 EELs or the DS1 transport needed for the EEL combination. Likewise, if the Commission finds CLECs are not impaired without access to DS1 transport on a certain route because the DS1 transport wholesale trigger is satisfied, that does not suggest that the competitive wholesale transport providers that satisfy the trigger will also provide an alternative wholesale DS1 EELs or the DS1 loop needed for the EEL combination.

---

[77] *TRO*, ¶ 575.

[78] *TRO*, ¶ 575.

Moreover, if the Commission finds non-impairment based on different wholesale alternative providers for the DS1 loop and transport components of an EEL, CLECs will likely face extremely high economic and operational barriers in trying to have these different providers combine their separate loop and transport facilities in a manner that produces a substitute to a ILEC's UNE DS1 EEL offering. Such high economic and operational costs include the inability of CLECs to obtain reasonable and timely cross connects between the loop and transport facilities as well as customer unwillingness to accept the delays and uncertainty associated with trying to have basic DS1 facilities provisioned through two alternative wholesale providers.[79]

As the Commission recognizes, the crux of a non-impairment finding based on the satisfaction of the wholesale trigger is that the alternative transmission providers offer "equivalent" or "comparable" wholesale products to that of the ILEC.[80] Therefore, because a non-impairment finding on a loop or transport portion of a EEL does not necessarily mean that alternative wholesale provider offers equivalent or comparable EEL substitutes, the Commission should establish and apply a separate non-impairment wholesale trigger for DS1 EELs. The test should be a combination of the loop and transport triggers and be both location- and route-specific. In application, the only time the DS1 EEL trigger should be deemed satisfied is if suitable wholesale DS1 EELS are available from a particular customer location and use the same transport route that the ILEC uses. Otherwise, the Commission should find that CLECs are generally impaired without unbundled access to DS1 EELs.

---

[79] *See TRO*, ¶¶ 303-304.

[80] *TRO*, ¶ 337; *see also* 47 C.F.R. §§ 51.319(a)(4)(ii)& 51.319(e)(1)(ii).

If the Commission, however, is disinclined to establish a separate DS1 EEL wholesale trigger, the Commission should, in the alternative, strictly base the availability of EELs on the availability of DS1 loops (i.e., the availability of unbundled DS1 transport should not limit the availability of a DS1 EEL). This is appropriate because when used as part of a DS1 EEL, DS1 transport merely extends the reach of the loop. Furthermore, unlike typical transport, DS1 transport used in an EEL does not aggregate traffic from multiple customers. Instead, the DS1 transport portion of the DS1 EEL is dedicated and provides dial tone to a single customer.[81]

Indeed, a DS1 EEL "extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the competitive LEC is already located."[82] Because of this, a carrier's ability to recoup the costs of a DS1 EEL depends solely on the revenue from the single customer served by that EEL.[83] Thus, DS1 transport when used to extend the reach of a DS1 loop shares the same economic hardship characteristics of that of a loop and carriers are, at a minimum, equally impaired (if not more so) without access to DS1 EELs as they are without access to stand-alone DS1 loops.[84] For these reasons and if the Commission does not establish a separate DS1 EEL wholesale trigger, only non-impairment determinations that apply to DS1 loops should apply to DS1 EELs.

---

[81] *See TRO*, ¶¶ 206 & 576.

[82] *TRO*, ¶ 576.

[83] *TRO*, ¶ 206.

[84] *TRO*, ¶ 206.

V. THERE SHOULD BE A NATIONWIDE IMPAIRMENT FINDING FOR DS3 AND DARK FIBER LOOPS

CLECs are "impaired on a customer-location-specific basis without access to unbundled DS3 loops."[85] CLECs continue to be unable to "recover the significant fixed and sunk construction costs of DS3 loops" and overcome the additional barriers to loop deployment associated with accessing rights-of-way; obtaining and paying for building access; difficulties in acquiring municipal and private rights-of-ways; gaining building access from owners of multiunit premises; and other service provisioning delays impair the ability of requesting carriers to self-provision single DS3 loops.[86] A DS3 loop cannot "provide a sufficient revenue opportunity to overcome these barriers."[87] Because the Commission's impairment analysis rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, CLECs are still impaired without access to DS3 loops due to their inability to recover such costs at the DS3 level.[88]

Similarly, CLECs are impaired without unbundled access to dark fiber loops. The *TRO* addressed dark fiber loops separately "due to economic and operational characteristics that

---

[85] *TRO*, ¶ 320; *see* BayRing Declaration, ¶ 5, & 9-16.

[86] *TRO*, ¶ 320; *see* BayRing Declaration, ¶ 12 (explaining that "[o]ne of the reasons that it is so difficult to overbuild without first having had access to ILEC loops is the timing factor. Prospective customers are generally interested in getting alternative service some time in the next 30 days, but it takes around a year to perform an overbuilding project. This is because it is necessary to get obtain (at substantial expense) access to Verizon owned or licensed poles and conduit, as well as building access, access to rights of way, and franchising."); OneEighty Declaration, ¶ 7 (OneEighty faces numerous economic and operation barriers in self-deploy DS3 loops. These barriers include difficulties in acquiring municipal and private rights-of-way and gaining building access from owners of multiunit premises).

[87] *TRO*, ¶ 320; *see* BayRing Declaration, ¶ 14; One Eighty Declaration, ¶ 7.

[88] *TRO*, ¶ 320; *see* One Eighty Declaration, ¶ 7.

distinguish dark fiber from 'lit' fiber."[89] As it did with DS3 loops, the *TRO* found "that it is generally not economically feasible to deploy duplicate fiber loop facilities," particularly where "the level of demand is not sufficient to warrant overbuilding the dark fiber already available from the incumbent LECs."[90] The Commission also recognized that although dark fiber allows CLECs to avoid the "high sunk costs" associated with fiber loop deployment, use of the fiber "requires significant investment in collocation and optronics," and that facilitating such investment is consistent with the goals of the Act and further allows CLECs to "reduce their reliance on "lit" high capacity loops."[91] Nothing has changed since the *TRO* that justifies altering these previous conclusions.

The Commenters understand that a study by QSI that will be submitted by others that shows that in these top tier areas, competitors have self-deployed DS3 loops to a small number of locations, made few such loops available at wholesale, and that no locations where the trigger was applied showed two or more dark fiber self provisioned CLEC dark fiber loops. It is therefore not surprising that CLECs are providing their own fiber facilities to only one percent at most of the estimated three million buildings in the United States that are served by ILECs.[92] Given this limited evidence, a conclusive and irrebuttable nationwide DS3 and dark fiber loop impairment finding is justified.

---

[89] *TRO*, ¶ 311.

[90] *TRO*, ¶ 313.

[91] *Id.*

[92] Ad Hoc Users Report at 16. Since self-provisioning loops to serve only a single DS3 worth of demand is not cost justified, those fiber loops are deployed with the intention of serving customers with multiple DS3s worth of demand.

VII. DS3 AND DARK FIBER TRANSPORT

A. Application of the National Presumption of Impairment to Discrete Classes of Transport

The *TRO* held that CLECs were presumptively impaired on a national basis without unbundled access to dedicated DS3 and dark fiber transport.[93] But in response to *USTA I*'s demand for a more granular analysis, the Commission speculated that under certain select circumstances there may be sufficient evidence of a competitive deployment on a particular transport route so as to justify a non-impairment finding. Accordingly, the *TRO* subjected each and every transport route in the nation to an independent impairment analysis.

But whereas *USTA I* criticized the Commission for generalizing too much, *USTA II* found fault in generalizing too little. While the court agreed that a non-impairment finding for one route did not compel a non-impairment finding for all similar routes, it found that this fact should not be deemed irrelevant either.[94] The Court found that the Commission must at least consider whether some degree of extrapolation of evidence from one route to others may be appropriate, although it conceded that in fact "it may be infeasible" to develop a standard that "may usefully be applied to MSAs or other plausible markets as a whole."[95] *USTA II* therefore still permits a route-by-route review process, but the Commission must also consider whether evidence of non-impairment for certain categories of routes is sufficiently extensive to reasonably permit a presumption of non-impairment for a narrowly-tailored class of similarly-situated routes. While route-by-route evaluations still offer the most accurate means of determining impairment, the

---

[93] *TRO*, ¶ 359.

[94] *USTA II*, 359 F.3d at 575.

[95] *USTA II*, 359 F.3d at 575 (parentheticals omitted).

Commission may reasonably be able take certain classes of routes off the table if supported by substantial evidence – some that would be exempted from unbundling, and others that would be subject to unbundling without the conduct of an independent route-by-route study.

The evidence from the state *TRO* proceedings will show the outlines of certain patterns of competitive deployment of fiber transport facilities that may permit such precise assumptions. In this connection, Commenters support the proposal that will be made by ALTS in this proceeding. It appears that the record in this proceeding will likely show: (1) significant deployment between the very largest wire centers in the urban cores of the top 50 metropolitan areas (MSAs); (2) a mixed record between medium-sized wire centers in these largest metropolitan areas; and (3) scant deployment outside the top 50 MSAs. Commenters support a blanket determination of impairment for the third category, and do not rule out the possibility that the ILECs will be able to justify a blanket determination of impairment for the first. The routes in between these two categories should remain subject to the presumption of impairment and the trigger review established by the *TRO*.

1. The Commission May be Able to Justify a Blanket Presumption of Non-Impairment for the Largest Wire Centers in the Top 50 MSAs

The ILECs' own presentations confirm, particularly by their omissions, that competitive deployment is essentially limited to just certain routes in the largest MSAs. Verizon, for example, recently emphasized that demand for high capacity services is "most heavily concentrated" between just 8% of its wire centers in its twenty largest MSAs.[96] SBC emphasizes CLEC deployment in the sixty-one largest metropolitan areas nationwide "where demand for

[96] Verizon July 2, 2004 *Ex Parte* Letter, Attachment 1, at 6.

high capacity services is concentrated."[97] Moreover, the data and maps presented by Verizon and SBC, even if they are accurate, suggest that the vast majority of all competitive deployment nationwide exists only within certain pockets of the largest MSAs.[98] This fact is corroborated by the Ad Hoc Telecommunications Users Report, which concluded that "special access services from competing providers remains confined to a small number ... of concentrated business districts."[99] Therefore, the Commenters remain open to the possibility that the Commission could, based upon evidence presented in this proceeding, establish a presumption of non-impairment for dedicated DS3 transport in the top 50 MSAs between wire centers each serving more than 40,000 business access lines.[100]

2. The Commission Should Make a Blanket Finding of Impairment for Smaller Wire Centers and All Routes Outside the Top 50 MSAs

But just as the Commission may reasonably be able to assume non-impairment in certain portions of the top 50 MSAs, it also can and should establish incontestable findings of impairment for areas where evidence of actual or potential competitive deployment is so lacking that the conduct of route-by-route analyses would be a waste of the Commission's and the parties' resources. The state *TRO* proceedings and elsewhere that there is scant evidence of

---

[97] SBC Aug. 18, 2004 *Ex Parte* Letter at 2.

[98] *See* Verizon June 24, 2004 *Ex Parte* Letter; SBC Aug. 18, 2004 *Ex Parte* Letter.

[99] Ad Hoc Users Report at 12.

[100] The access line thresholds set forth in these Comments are based upon the Commenters' understanding of a proposal to be made by other competitive carriers in this proceeding. Any thresholds based upon the number of access lines should be as of the date established by the Commission. Future changes in technology or service patterns could result in an increase of the number of access lines that would not necessarily correspond to a decrease in impairment.

competitive deployment outside the top 50 MSAs,[101] or to or from a wire center with fewer than 10,000 business access lines even in those top 50 MSAs.[102]

Approximately twenty-five state proceedings were conducted at least through the hearing phase. The evidence from these cases, which Commenters understand will be presented by the states and by other parties, found that very few transport routes met the *TRO*'s triggers, and of these nearly all were located between two large wire centers in a major city. For example, the New York Public Service Commission staff analyzed the nearly 4000 transport routes Verizon claimed met the triggers in its initial filing, and found that only 44 DS3 transport routes, all in Manhattan, met the FCC's self-provisioning trigger.[103]

The state commission findings of the absence of competitive alternatives outside of the major urban cores is confirmed by the persuasive and reliable third-party evidence presented by the Ad Hoc Users Report. According to the Ad Hoc Users, "competitive [dedicated transport] service is available on a very limited basis, and the [ILECs] remain the sole source of dedicated (special) access connectivity at roughly 98% of all business premises nationwide."[104] Thus even

---

[101] *See also* BayRing Declaration, ¶ 19 ("most of the transport routes in BayRing's market area do not lend themselves well to the existence of a viable wholesale transport market. Traffic level, geographic distances and coordination problems all hinder the development of a wholesale market. Again, we have investigated the availability of alternative providers of interoffice transport throughout New Hampshire, and have found availability (generally only from a single alternative provider, Neon) in only 5 of Verizon's 117 New Hampshire wire centers."). As the Commission recognized in its triggers, the existence of a single competitive provider is not enough on which to base a finding on non-impairment. Absent any unbundling requirement, that single provider would be a near-monopolist.

[102] Even where evidence of actual deployment exists, it is questionable in hindsight whether many of these investments could or would be made today by efficient and rational competitors.

[103] NYPSC Staff *TRO* Analysis, Case 03-C-0821, March 31, 2004 at 4. Thirty-seven of these 44 routes also met the wholesale trigger. *See id.* at Attachments 5 and 6. Notably, for the entire State of New York, only 48 DS3 routes met the self-provisioning trigger.

[104] Ad Hoc Users Report at 11.

large corporate users remain "overwhelmingly dependent upon the traditional incumbent telephone monopolies for the vast majority of locations and service requirements."[105] And the ILECs' continued dominance of these markets is confirmed by their own behavior -- Qwest recently proposed a 68% increase in its tariffed DS3 special access rates,[106] while other RBOC special access rates remain unreasonably high.[107] The RBOCs' inflated rates for special access services could not be sustained in a competitive transport market.[108]

For these third-tier routes, therefore, the Commission would be justified in making a blanket finding that its existing presumption of impairment is elevated to a finding of impairment. The *TRO* already established, and nothing in the record contradicts, the basis for a general presumption of impairment with respect to dedicated DS3 and dark fiber transport.[109] This presumption is based upon an evidentiary record that reveals that "deploying transport facilities is an expensive and time-consuming process ... requiring substantial fixed and sunk costs," including the costs of collocation, fiber-optic cable, construction, obtaining rights-of-way, and the optical equipment to light fiber.[110] Now, on top of this presumption, the records of the state *TRO* proceedings and the utter absence of evidence of significant competitive deployment permits the Commission to move from a presumption to a finding of non-impairment for

---

[105] Ad Hoc Users Report at 12.

[106] *See* Qwest Tariff Transmittal 206, AT&T Petition to Suspend, Aug 23, 2004; Ad Hoc Users Sep. 13, 2004 *Ex Parte* Letter, Attachment 1.

[107] Ad Hoc Users Report at 27-40.

[108] *Id.* As a contrasting example, Qwest's rates for ISDN (a competitive service) have fallen substantially in recent years.

[109] *TRO*, ¶ 359.

[110] *TRO*, ¶ 371.

transport routes outside the top 50 MSAs and routes within the top 50 MSAs that connect a wire center with 10,000 or fewer business access lines.

3. Transport Routes that Fall in Between Would Remain Subject to Unbundling Pending Application of the *TRO* Triggers

For the transport routes that fall between the two carve-outs generally described above, Commenters support the ALTS proposal to apply the triggers on a route-by-route basis, as it originally contemplated would occur for all transport routes. The evidence submitted by the ILECs to date is not sufficient to overcome the national presumption for impairment on any more generalized basis outside the very largest wire centers in the Top 50 MSAs. Given the countervailing evidence of impairment as a general matter, as found by the *TRO*, these routes must remain subject to unbundling pending a final determination of non-impairment in the Commission's route-by-route analysis.

In this middle tier, substantial variability in the entry barriers among different routes seems to make it all but impossible to infer that entry on one route makes entry on another efficient. CLEC experience demonstrates that there are significant differences in the costs to construct a transport route between central offices, even from one adjacent street to another. The *TRO* therefore recognized that "operational and economic concerns ... will vary depending on the geographic market served" with the result that "the extent of competitive deployment of transport facilities can vary tremendously by geographic area."[111] For example, many major cities have prohibited additional trenching in city streets for a period of years after the city has repaved its

[111] *TRO*, ¶ 376.

streets.[112] An impairment test that assumed impairment throughout an entire city or metropolitan area would fail to account for such differences and would therefore fall short of the Commission's statutory obligation to consider impairment in implementing the Act.

B. The Commission Should Ameliorate CLEC Impairment by Prohibiting the ILECs' Anticompetitive Exclusive Service Arrangements.

The Commenters' emphasis on the evidence of their impairment should not be taken as an indication that they prefer UNE access to the ability to compete with the ILECs on a level playing field. On the contrary, the Commenters share the Commission's objective of healthy facilities-based competition. Accordingly, in its review of CLEC impairment, the Commission should also seek to address sources of existing impairment that are within the Commission's control.

One of the significant contributing factors to CLEC impairment is caused by the ILECs themselves. The RBOCs' access tariff pricing plans regularly contain provisions that grant price concessions to customers that commit to refrain from using competitive or self-deployed access services.[113] Such provisions allow the incumbents to lock up potential customers and deny would-be competitive wholesale providers access to a significant segment of the addressable market for dedicated transport. By sucking the air out of the addressable market, the ILECs

---

[112] In response to the court's hypothetical question, evidence of competition on route A to B may be explained because competitors were permitted to trench a continuous path on that route, which may not be a permissible option for the entire route between wire center A and wire center C. *USTA II*, 359 F.3d at 575.

[113] *See AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Formal Complaint of AT&T Corp.*, RM No. 10593 (Filed July, 1 2004).

impede competitive wholesale deployment before it ever occurs.[114] The Commission acknowledged the relationship between competitive entry decisions and "lock up" provisions in the *Pricing Flexibility Order*, observing that an ILEC "can forestall the entry of potential competitors by "locking up" large customers by offering them volume and term discounts."[115] The Commission should therefore prohibit incumbent carriers from offering or enforcing these anticompetitive lock-up terms for special access services.

VI. IF THE TRIGGERS ARE APPLIED, THEN THE COMMISSION SHOULD ADHERE TO THE GUIDELINES PROPOSED BELOW

If the self-provisioning and wholesale triggers are employed to any extent, the Commission needs to carefully apply them in accordance with the guidelines discussed below to ensure that erroneous results do not foreclose access to facilities where impairment actually exists.

A. Self-Provisioning Triggers

Should the self-provisioning triggers be applied, the Commission should place the burden on the ILECs to demonstrate that the triggers have been fully satisfied and ensure that the ILECs are defining loops and transport routes properly. In the *TRO*, the Commission elaborated that "even if, on the incumbent LEC's network, a transport circuit from 'A' to 'Z' passes through an intermediate wire center 'X,' the competing providers must *offer service* connecting wire centers 'A' and 'Z,' but do not have to mirror the network path of the incumbent LEC through wire

---

[114] There is no dispute that CLECs cannot economically self deploy competitive facilities without a sufficient revenue commitment to cover the capital costs they incur to deploy facilities needed to provide the requested service.

[115] *Pricing Flexibility Order*, ¶ 79 (The Commission further observed that this has ramifications for smaller customers as well because competitors typically will deploy to serve the high demand customers then can serve smaller adjacent customers suing same facilities. In effect by locking up the large corporate users the ILEC locks up the adjacent small business customers as well).

center 'X'."[116] Thus, under the self-provisioning triggers, the Commission should confirm that transport service is being offered between the two wire centers in question.

The Commission's self-provisioning transport trigger also requires that ILECs demonstrate that alternative providers be operationally ready to offer services over their self-provisioned facilities at the relevant capacity level.[117] The Commission needs to recognize that the only effective and practical way of knowing that a CLEC is operationally ready under the self-provisioning triggers is to have actual evidence that the CLEC is actually providing service on the given transport route at the relevant capacity level. This is consistent with the Commission's requirement that evidence be provided that CLECs are *serving* customers using self-provisioned loop services, and that CLECs *offer service* between two wire centers on a given transport route. While the existence of CLEC facilities is obviously a prerequisite to the provision of service, the mere existence of such facilities does not demonstrate whether the equipment can be used to provide the service to satisfy the trigger, whether the CLEC can provide service at the requisite capacity level, nor whether the CLEC has performed the necessary engineering, provisioning, and administrative tasks to ensure that service can be provided at all or in a sufficiently timely manner to permit provisioning services to customers seeking the services within a competitive timeframe.

Another critical consideration that the Commission must be mindful of when applying the self-provisioning triggers is which facilities count as "owned facilities." The Commission should make sure that in order for facilities to count as "owned", the carrier has deployed its

---

[116] *TRO*, ¶ 401.

[117] *See TRO*, ¶ 406.

"own facilities" on the entire loop or transport route. In the *TRO*, the Commission held there are two ways that a carrier can have ownership over the facilities: (1) the carrier can have legal title to the facilities or (2) the carrier can have a "long-term" (*i.e.,* 10 years or more) dark fiber indefeasible right of use ("IRU") if the fiber is lit by the qualifying carrier by attaching its own optronics to the facilities. If the carrier does not use its own facilities, then the Commission should not count the carrier for purposes of the self-provisioning trigger.

Significantly, certain facilities should not counted by the Commission as owned facilities. For instance, facilities obtained from other sources such as through special access arrangements, UNEs, capacity leases (unless they are long term IRUs), and all third party provided facilities do not count as "owned facilities." As explained in the *TRO*, a CLEC "using the special access facilities of the incumbent LEC or the transmission facilities of the other competitive provider ... would *not* satisfy the definition of a self-provisioning competitor for purposes of the trigger."[118] In addition, to prevent double counting of facilities, the Commission needs to make sure that a carrier may not be using "facilities owned or controlled by one of the other two providers on the premises [for loops]."[119]

Lastly, because the self-provisioning and wholesale triggers are separate and distinct, the Commission needs to recognize that if a ILEC demonstrates that a carrier satisfies the requirements for the self-provisioning trigger that does not mean that the CLEC automatically satisfies the wholesale trigger. The purpose of the self-provisioning trigger is to determine through actual experience whether similarly situated CLECs feasibly can deploy their own

---

[118] *See TRO*, ¶ 333.

[119] *See TRO*, ¶ 333.

facilities on a particular route. In contrast, the wholesale trigger examines whether the provider makes its facilities available to other carriers. Some wholesale carriers also may self-provide facilities to serve their own retail customers. However, other wholesale carriers may not provide any retail service and thus cannot be self-provisioners under the triggers. Obviously, if every wholesale carrier was also counted as a "self-provisioner" solely by virtue of the fact that it owns facilities, it would eliminate the distinction between these two triggers.

B. Wholesale Triggers

First, the Commission should place the burden on the ILECs to demonstrate that the trigger has been satisfied and not make non-impairment determinations based on broad brush assumptions regarding what wholesale providers offer. The Commission should recognize that carriers may provide some wholesale services; however, they may not be in a position to offer the specific high capacity loop or transport services needed to fully satisfy the wholesale trigger being applied.[120] For example, a carrier may offer wholesale data or long distance voice services, and may also have established collocation arrangements for the self-provision of service to a specific retail customer. However, the fact that the carrier is a wholesale provider of an unrelated service is not relevant to the trigger analysis if the carrier is not offering wholesale services specific to its collocation arrangements. Further, a carrier that is a wholesale provider of high capacity loops or transport at the OC(n) capacity level would not necessarily offer on a "widely available" basis loops or transport at the DS1 or DS3 levels.

---

[120] *See On the Commission's Own Motion to facilitate the implementation of the Federal Communications Commission's Triennial Review determinations in Michigan*, Case No. U-13796, Administrative Law Judge's Notice of Proposal for Decision, at 31-33 & 43-46 (Mich. P.S.C. May 10, 2004) (finding that the competing carriers named by SBC do not satisfy the wholesale triggers needed for a non-impairment finding at the locations or on the routes that SBC identified).

RBOCs in the state nine month *TRO* implementation proceedings generally relied (and they still rely[121]) on unverified data from GeoResults and GeoTel which are third party market research firms. The GeoTel data purportedly reveals all the competitive fiber facilities that have been deployed, whereas GeoResults reveals which buildings are served by lit fiber of competing carriers. Conspicuously missing from this information is whether such facilities are used to provide services on a wholesale basis at the relevant capacity level or criteria needed to determine if the wholesale triggers have been satisfied.

Notably, for example, in the Illinois nine-month Triennial Review Implementation proceeding, SBC blindly relied on GeoResults' information regarding which buildings had competitive lit fiber and did not confirm the accuracy of that information with the identified competitive providers.[122] Nor did SBC confirm with the competitive providers what the relevant capacity levels for a building were or if the buildings met other aspects of the Commission's rules established for the triggers such as operational readiness, ownership of facilities, and access to the entire building. Because of this, many of the buildings or carriers identified by GeoResults conflicted with the carriers own data. For example, GeoResults indicated that there were six buildings to which MCI purportedly provides facilities, but those six buildings do not appear on the list of buildings that MCI asserted its facilities serve, and that list was provided in response to SBC's first set of discovery well in advance of the date on which SBC circulated its direct

---

[121] Verizon's July 2, 2004 Ex Parte Letter, attachment Declaration of Judy K. Verses, Ronald H. Lataille, Marion C. Jordan, and Lynelle J. Reney, ¶¶ 9, 16-18, & 20-30; SBC Aug. 18, 2004 *Ex Parte* Letter, at 3; Qwest Aug. 20, 2004 *Ex Parte* Letter, at 2.

[122] *Implementation of the Federal Communications Commission's Triennial Review Order with respect to Local Loops and Dedicated Transport*, Illinois Commerce Comm. Docket No. 03-0596, Direct Testimony of Gary J. Ball at 17 (distributed Jan. 14, 2004).

testimony in that proceeding. Despite having in its possession information that contradicted the GeoResults claims, SBC included the GeoResults information in its triggering analysis.[123] The unsubstantiated data provided by GeoResults and GeoTel should not be afforded any weight when considering whether the triggers have been satisfied.

Second, ILECs must prove that each loop at the relevant capacity level (which is being considered under the wholesale trigger) terminates at a location that affords alternative providers access to the entire customer premises – including, in multi-tenant buildings, access to the same common space, house, and riser, and other intra-building wire as the ILEC enjoys.[124] If a loop does not provide alternative providers with access to the entire customer premises, then the carrier providing the loop should not be counted for purposes of satisfying the loop wholesale triggers because, without access to the entire customer premises, that carrier is not truly offering an alternative wholesale service for loops. ILECs need to provide the Commission with evidence that with respect to the high capacity loop in question. As an example, alternative providers may offer a connection through a collocation arrangement in an ILEC central office. Competitors must be able to connect to that alternative provider's wholesale DS1 loop via another carrier's transport, with their own collocated facilities, or with ILEC UNE transport.

Third, before the Commission concludes that a high capacity loop wholesale trigger has been satisfied, an ILEC must prove to the Commission that the wholesale provider is operationally ready and willing to specifically provide high capacity transport to other carriers.[125]

---

[123] *Id.*

[124] *See TRO*, ¶ 337; 47 C.F.R. § 51.319(a)(4)(ii)(B).

[125] *See TRO*, ¶¶ 338 & 414; 47 C.F.R. § 51.319(e)(1)(ii)(A).

At a minimum, ILEC must show that each wholesale provider: Has sufficient systems, methods and procedures for pre-ordering, ordering, provisioning, maintenance and repair, and billing; Possesses the ability to actually provision wholesale high-capacity loops to each specific customer location identified or to provide dedicated transport along the identified route; For loops, has access to an entire multi-unit customer premises; Is capable of providing transport at a comparable level of capacity, quality, and reliability as that provided by the ILEC; for transport, is collocated in each central office at the end point of each transport route; Has the ability to provide wholesale high capacity loops and transport in reasonably foreseeable quantities, including having reasonable quantities of additional, currently installed capacity; Reasonably can be expected to provide wholesale loop and transport capacity on a going-forward basis; and can provide service in a commercially reasonable timeframe, because if it takes to long to receive service, customers will not sign up with CLECs.

Fourth, ILECs must fully demonstrate that the alternative providers offer their high capacity services on a widely available basis at the relevant capacity level.[126] Such evidence must demonstrate that the services are made available on a common carrier basis, for example, through a tariff or standard contract and not via an offer to negotiate an individualized private carriage contract. In addition, each carrier identified as a wholesale provider must be able "immediately to provide" wholesale service. 47 C.F.R. § 51.319(e). If the carrier is required to construct facilities in order for the service to be made available, the Commission should deem that the service is not widely available.

---

[126] *See TRO*, ¶¶ 337, 414; 47 C.F.R. §§ 51.319(a)(4)(ii)(A) & 51.319(e)(1)(ii)(B).

Finally, before a high capacity loop or transport wholesale triggers are deemed satisfied, the Commission should have evidence that CLECs have reasonable access to the wholesale provider. For instance, requesting carriers must be able to access cross-connects at nondiscriminatory rates, terms, and conditions in accordance with FCC and state commission rules. In addition, ILECs must provide requesting carriers with adequate cross-connect terminations at cost-based rates, and must enable sufficient capacity expansion. If carriers are not able to cross connect at the SBC central office, then they cannot obtain access to the wholesale providers' facilities.

VII. PROVISION OF ANY TELECOMMUNICATIONS SERVICE "QUALIFIES" A CARRIER FOR UNE ACCESS

Section 251(d)(2) requires the Commission to require unbundled access to network elements where the lack of access "would impair the ability of the telecommunications carrier seeking access to provide the *services* it seeks to offer."[127] *USTA II* makes clear that the Commission cannot interpret the term "services" to limit UNE eligibility to providers of certain "qualifying telecommunications services" without first making a non-impairment determination for each particular type of service that is proposed for exclusion. The court found that "long distance services or other telecommunications services that do not compete directly with core ILEC services" "clearly fall within the plain meaning of" the term services in section 251(d)(2).[128] The Commission is therefore barred from readopting the determination in the *TRO* that limited the use of UNEs to CLECs that provided a "qualifying" service, which it defined as "those telecommunications services offered by requesting carriers in competition with those

[127] 47 U.S.C. § 251(d)(2) (emphasis added).

[128] *USTA II*, 359 F.3d at 592 (parentheticals and quotation marks omitted).

telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs."[129]

Next, the Commission can and should reaffirm its finding in the *TRO* that "once a requesting carrier has obtained access to a UNE ... the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services."[130] The Commission found that this approach represented the optimal balancing of the costs and benefits of unbundling, since "once the Commission has determined to impose "the costs associated with mandatory unbundling" upon an incumbent LEC, it would be wasteful for the network element not to be put to its maximum use."[131] The Commenters strongly agree and urge the Commission not to weaken section 51.100(b) of its rules. As the *TRO* noted, CLECs need the flexibility to provide multiple services over UNEs to offer the types of bundled packages that consumers demand in order to be able to meaningfully compete against the incumbents, which aggressively market bundled services.[132]

Therefore, under *USTA II* and the Act, CLECs are entitled to obtain UNEs for any service where denial of the UNE would result in impairment. Next, under rule 51.100(b), a CLEC that is entitled to a UNE for one type of service may use it for all services. The net result of these two

---

[129] *TRO*, ¶ 135. While the *TRO* would have permitted CLECs to also offer other services over the UNE, they were required to provide at least one qualifying service on a common carrier basis over each UNE. *TRO*, ¶¶ 143-149. The Commission based these restrictions, not on any determination of non-impairment for non-"qualifying" services, but upon an interpretation that the Act intended or permitted such exclusion. *TRO*, ¶¶ 137-139, 141.

[130] *TRO*, ¶ 143.

[131] *TRO*, ¶ 143.

[132] *TRO*, ¶ 146.

principles is that the Commission may only exclude requesting carriers that would not be impaired with respect to *any* of the telecommunications services they seek to offer.

VIII. COMMINGLING OF SECTION 271 ELEMENTS MUST BE PERMITTED

The Commission should reject any arguments that that BOC transmission, switching, transport, or signaling unbundled under section 271 need not be commingled with wholesale services or combined with UNEs. With respect to the commingling of section 251 UNEs with other network elements, the Commission requires BOCs to commingle "facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to *any method other than unbundling under Section 251(c)(3)* of the Act,"[133] which includes, without doubt, the wholesale services and facilities a BOC provides pursuant to section 271.

Disagreements have arisen regarding the Commission's intention when, in the *Triennial Review Order Errata*, it eliminated certain references to section 271 elements in regard to BOC commingling obligations. BOCs as a result are refusing to commingle section 271 elements. However, the *Errata* made no express determination regarding section 271 elements, so it has no effect on BOC obligations.

In paragraph 579 of the *Triennial Review Order*, the FCC made very clear that BOCs must commingle or combine section 251 elements with section 271 elements. While the *Errata* did eliminate the reference to section 271 from paragraph 584 of the *TRO*, that deletion was simply to clarify that the purpose of Paragraph 584 was to discuss the BOCs' commingling obligations relative to resold service. The deletion in Paragraph 584 in no way altered or impacted what the FCC made clear in the very first substantive paragraph on the ILECs'

[133] *TRO*, ¶ 579.

commingling obligations – that they are required to commingle section 251(c)(3) UNEs with all other network elements obtained at wholesale pursuant to any method other than unbundling pursuant to section 251 of the Act. Moreover, the *Errata* removed a sentence in footnote 1990 in which the Commission had declined to required commingling of section 271 elements, thus further clarifying its intent regarding those elements.

All of the policy and legal justifications presented in the *TRO* for requiring commingling of section 251(c)(3) network elements with other services apply with equal force to network elements obtained pursuant to section 271. The Commission has ample authority under the nondiscrimination provisions of sections 201 and 251(c)(3) to require commingling of wholesale services with network elements obtained pursuant to section 271.[134] As recognized by the Commission, restrictions on commingling would lead to the impractical and competition-thwarting result of CLECs being required to establish two separate networks. A "commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them ... to operate two functionally equivalent networks."[135] Further, commingling does not place any additional burdens on ILECs.

Accordingly, to the extent that any clarification is necessary, the Commission should determine that ILECs must provide network elements pursuant to section 271 and must permit commingling of them with section 251(c)(3) UNEs or tariffed services.

---

[134] *Id.*

[135] *TRO*, ¶ 581.

IX. ENTRANCE FACILITIES MUST BE UNBUNDLED

USTA II remanded to the FCC its unlawful determination that entrance facilities were not "network elements" as defined under the Act.[136] In doing so, the court suggested that the Commission required a more fully developed record regarding: 1) the definition of the entrance facility element; 2) the reasons ILECs have traditionally supplied other carriers with entrance facilities and 3) an analysis of whether requesting carriers are impaired without access to entrance facilities. We will explain below that the Commission cannot circumvent the logical conclusion that entrance facilities are a network element as defined in the Act; that the element is distinct from dedicated interoffice transport as the FCC found in the *TRO* and thus should be defined as part of a separate element, not as part of dedicated transport, and that many carriers remain impaired without access to entrance facilities, particularly those deployed at a capacity of DS1 or less.

A. Entrance Facilities Plainly Are Network Elements as Defined by the Act

The D.C. Circuit remanded the finding of the *TRO* that held that an entrance facility is not a network element. The definition of network element set forth in the Act is plain: "a facility or equipment used in the provision of a telecommunications service."[137] Despite the fact that entrance facilities are network equipment that the ILECs constructed to provide wholesale telecommunications services, the *TRO* determined that "the Act does not require incumbent LECs to unbundled transmission facilities connecting incumbent LEC networks to competitive

[136] *USTA II*, 359 F.3d at 586.

[137] 47 U.S.C. § 153(29).

LEC networks for the purpose of backhauling traffic."[138] *USTA II* found that "Commission's reasoning appears to have little or no footing in the statutory definition" and remanded to the Commission, explaining that "If entrance facilities are correctly classified as "network elements," an analysis of impairment would presumably follow."[139]

There is no plausible basis to conclude that entrance facilities are not facilities or that they are not used to provide a telecommunications service. Therefore, the Commission must order the unbundling of entrance facilities to the extent that requesting carriers are impaired without such access, as determined pursuant to section 251(d)(2)(B).[140]

B. Entrance Facilities Have Traditionally Been Provided By ILECs and Other Carriers and Are, Therefore, Part of Their Networks

In remanding the Commission's unlawful determination that entrance facilities are not network elements, the D.C. Circuit suggested that the *Triennial Review* record lacked an adequate explanation of how and by whom entrance facilities have traditionally been deployed. As explained below, Commenters show that ILECs have traditionally supplied telecommunications carriers with entrance facilities under special access tariffs. ILECs offered these services after divestiture in order to provide IXCs with access to their network. In order to remedy anti-competitive practices, the FCC subsequently required ILECs to provide entrance facilities to special access customers including competitive carriers regardless of other special access services the carrier or customer obtained. Thus, it is clear that provision of entrance facilities by the ILECs has long been the practice and benefits the incumbent as well as the new

---

[138] *TRO*, ¶ 365.

[139] *USTA II*, 359 F.3d at 586.

[140] *See* 47 U.S.C. § 252(d)(2)(B) (the FCC "shall" consider impairment.).

entrant. Although typically it is the new entrant that has the stronger desire to connect to the ILEC network, the ILEC has an incentive to permit such connections, namely the principle of network effects. In addition the Act obligates all telecommunications carriers to directly or indirectly connect to other carriers.[141]

C. Definition of the Entrance Facility Element

The Commission's definition of entrance facility should be made clear to avoid costly disputes and promote consistency across the states. In the past the Commission's definition of entrance facility was a transmission facility between an ILEC switch or wire center and a CLEC switch or wire center. Numerous ILECs have interpreted this definition to preclude carriers from obtaining entrance facilities where there is no switch at the CLEC POP, asserting that the terms "wire center" is synonymous with switch. Although it is obvious that the term wire center and the term switch as used in the definition cannot both mean switch under standard legal principles of sentence construction, the Commission should clarify its definition to preclude further distortion by incumbent LECs.

In addition to being unduly susceptible to manipulation by the ILECs, the Commission's previous definition of entrance facility was not technology neutral. By referring to switches and wire centers the definition of entrance facility arguably excluded carrier locations of carriers that provide non-switched services, particularly data services such as xDSL. As discussed above xDSL carriers aggregate traffic form xDSL loops at a collocation arrangement at an ILEC wire center and then carry that traffic to a POP or hub where that traffic is then carrier to the Internet. It makes no sense, and would conflict with the Commission's long standing policy of ensuring

[141] 47 U.S.C. § 251(a)(1).

that its unbundling regulations are technology neutral for the Commission to arbitrarily exclude data carriers or other carrier locations from the definition of the entrance facility network element.

That definition should simply specify that an entrance facility is a transmission facility dedicated to a single customer or carrier between an ILEC switch or wire center and a requesting carrier location including but not limited to a switch, wire center, hub or POP. This definition will provide requesting carriers certainty that where they are impaired without access to such facilities the ILEC will provision the element and that carriers that provide services that do not employ switching will have the same right to access such elements as those providing switched services.

D. CLECs Are Impaired Without Access To Entrance Facilities and The Commission Should Apply Triggers to the Extent They are Applied to High Capacity Loop and Transport Facilities

As it did in the *Triennial Review*, the Commission should assess competitive carrier impairment for the entrance facility element based on the capacity needs along particular routes. Similar to the rules adopted (and not challenged) in the *TRO* that CLECs are not impaired without access to OCn loops or dedicated transport, the Commission should find that CLECs are not impaired without access to OCn entrance facilities. To the extent that a carrier requires other capacity entrance facilities the same rules applicable to dedicated transport and loops should apply. First, the Commission should find that CLECs are impaired without access to DS1 entrance facilities. As the Commission acknowledged in the *TRO* there is simply no evidence demonstrating that carriers have overcome the barriers to entry that make self-provisioning economic or that wholesale entrance facilities are available in the competitive marketplace. At

the level of DS1, CLECs are limited to one and only choice - obtain service from the incumbent LEC.

Access to entrance facilities at other capacity levels should be treated similarly to the Commission's rules for loop unbundling of DS3 and dark fiber loops. Such treatment is justified because in many instances the building access issues are similar in that many carrier POPs are located in commercial office buildings.[142]

As for DS3 and dark fiber loops, there should be a limit to the number of loops a CLEC could obtain as an entrance facility to a particular building. As with DS3 loops, the limit should be established at two DS3 loops. If the carrier is adding a third DS3 than it is no longer impaired without access to the combined functionality of the ILECs fiber transmission and multiplexing capacity. The CLEC may be entitled to access a dark fiber entrance facility and invest in the equipment to light that fiber but the carrier is no longer able to obtain DS3 entrance facilities to that building.

E. The Commission Should Clarify that Regardless of the Treatment of Entrance Facilities for Backhaul, Transport Facilities Used for Interconnection Pursuant to § 251(c)(2) Must be Provided at TELRIC

In the *TRO*, the Commission distinguished between ILEC interoffice transmission facilities used to backhaul traffic and facilities used "for the transmission and routing of telephone exchange service and exchange access" under § 251(c)(2) of the Act. The Commission specified that "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act explicitly

[142] *See* Joint Declaration of T. Galvan, and F. Maella, Attached to Comments of Alpheus Communications, L.P., filed Oct. 4, 2004 at ¶ 48.

provides for this and we do not alter the Commission's interpretation of this obligation."[143] The FCC added that Section 251(c)(2) requires access to the "facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's *network* . . . for the transmission and routing of telephone exchange service and exchange access."[144]

Thus, while narrowing the definition of dedicated transport, the *TRO* explicitly preserved the right of CLECs to use ILEC dedicated transport for interconnection purposes. The Commission stated, "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic."[145] The Commission therefore requires ILECs to offer interoffice dedicated transport facilities at TELRIC-based rates when the facilities are being used to interconnect with ILECs for routing and transmission of telephone exchange service and exchange access.

The Commission needs to render a clarification in this regard because ILECs have actively undermined §251(c)(2) and the Commission's clear directive by forcing CLECs to pay special access prices for interconnection facilities. The Commission should clarify that CLECs are entitled to use of such facilities for interconnection at TELRIC-based rates. There should be no question of a CLEC's right to access these facilities for purposes of interconnection, and there is no question that CLECs have a statutory right to access these facilities for interconnection purposes at TELRIC-based prices. Given this, the Commission should make clear that nothing

---

[143] *TRO*, ¶ 366.

[144] *Id.*, n.1117 (emphasis in original).

[145] *TRO*, ¶ 366.

in the Commission's unbundling rules alters the ILEC obligation to provide interconnection using facilities, any facilities, including those facilities that are explicitly not available as UNEs under 251(c)(3), at TELRIC rates for purposes of 251(c)(2) interconnection.

X. STATES MAY ESTABLISH PRICING AND OTHER TERMS OF SECTION 271 UNBUNDLING, AT A MINIMUM, POST-INTERLATA ENTRY

A. Just and Reasonable Pricing May Be Equivalent to TELRIC

In the *Triennial Review Order*, the Commission found that section 271 of the Act imposed unbundling obligations separate from those of section 251 and that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[146] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Act empowered the Commission to adopt rules that implement the Act, the Commission held that the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Act should be applied to § 271 UNEs. The Commission further held that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[147]

The Commission should take this opportunity to clarify its discussion of this issue by providing that although section 252(d) TELRIC pricing does not automatically apply to 271 unbundled network elements, neither does it preclude application of cost based rates under section 252(d). In fact, there is no theory or construction of the section 201(b) just and reasonable standard that would exclude a cost based (plus a reasonable profit) pricing standard. Cost-based is the traditional benchmark for reasonable prices. Therefore, the Commission

---

[146] *TRO*, ¶ 656.

[147] *TRO*, ¶ 664 (aff'd *USTA II*, 359 F.3d at 589).

should determine that section 201 just and reasonable pricing accommodates TELRIC pricing notwithstanding that other pricing may also qualify in some cases as just and reasonable.

B. State Commissions Have the Authority to Set Rates, Terms, and Conditions for Section 271 UNEs

In a recent petition requesting preemption of the Tennessee Public Service Commission, incorporated by the Commission into the record of this proceeding, BellSouth has raised the issue of whether states may set pricing for section 271 network elements.[148] The Tennessee Public Service Commission in the context of an arbitration had determined the market price for section 271 network elements. For all the reasons stated by CLECs in comments on that petition, the Commission may not preempt the Tennessee commission.[149]

To briefly reiterate those arguments here, however, the Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service,"[150] under which the Commission has the power to regulate "interstate and foreign commerce in wire and radio communication."[151] The Commission is generally forbidden from entering the field of intrastate communication service, which remains the province of the states.[152] Whether the Commission

---

[148] *See BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, Petition of BellSouth, Docket 04-245 (filed July 1, 2004).

[149] *See e.g., BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, Comments of Cbeyond Communications, LLC, CTC Communications Corp., El Paso Networks, LLC, McLeod Telecommunications Services, and TDS Metrocom, LLC., Docket 04-245 (filed July 30, 2004), and Comments of AT&T (filed July 30, 2004).

[150] *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 360 (1986).

[151] 47 U.S.C. § 151.

[152] *See Louisiana Pub. Serv. Comm'n,* 476 U.S. at 360; *see also Illinois Pub. Telecomms. Ass'n v. FCC,* 117 F.3d 555, 561 (D.C. Cir. 1997); *see also City of Brookings Mun. Tel. Co. v. FCC,* 822 F.2d 1153, 1155 (D.C.Cir.1987) ("[T]he FCC enjoys jurisdiction over interstate rates, whereas the several States reign supreme over intrastate rates.").

may preempt state regulation of intrastate telephone service depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law."[153]

The Supreme Court has found that the "best way" to determine if there is preemption "is to examine the nature and scope of the authority granted by Congress to the agency."[154] In cases involving the Communications Act, that inquiry is guided by the language of section 152(b),[155] which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the Commission's power, but also a rule of statutory construction."[156] For instance, in applying this test in a challenge to the Commission's authority under section 276 of the Act, courts have held that special provisions concerning BOCs "should not be read to confer upon the FCC jurisdiction" unless such provisions are "so *unambiguous or straightforward* so as to override the command of § 152(b)."[157]

In *New England Public Comm. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) ("*New England Public Comm. Council*"), the Court found that section 276 "unambiguously and straightforwardly" grants the Commission the authority to regulate the BOCs' intrastate payphone line rates. In *New York & Public Service Com'n of New York v. FCC,* 267 F.3d 91, 102 (2nd Cir. 2001) ("*New York*"), the court held that section 251(e) grants the Commission

---

[153] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 369.

[154] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

[155] Section 152(b) of the Communications Act provides, "Except as provided in sections 223 through 227..., inclusive, and section 332 ..., and subject to the provisions of section 301 of this title..., *nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ...charges, classifications, practices, services facilities, or regulations for or in connection with intrastate communications service...."* 47 U.S.C. § 152(b) (emphasis added).

[156] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 373.

[157] *Illinois Pub. Telecomms. Ass'n,* 117 F.3d at 561 (emphasis added, internal quotation marks omitted) (citing *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 377).

authority to act with respect to those areas of intrastate service associated with the North American Numbering Plan and its administration.[158] The court found that this explicit grant of authority provides the requisite "unambiguous and straightforward" evidence of Congress's intent to override the command of § 152(b) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction over intrastate service."[159]

Unlike sections 276(b) and 251(e) of the Act, section 271 does not "unambiguously and straightforwardly" grant the Commission the sole authority to establish rates, terms and conditions for 271 UNEs. While the Commission is entrusted with granting or denying section 271 applications, the Act is silent on who sets terms and conditions for section 271 unbundling after interLATA entry.

Nor does section 271 have a specific provision similar to 276(e) that expressly states that Commission regulations preempt inconsistent state commission decisions. Therefore, consistent with the *New England Public Comm. Council* and *New York* decisions, it would be unlawful for the Commission to preempt state commissions from exercising their section 152(b) authority and regulate 271 UNEs because nothing in section 271 unambiguously and straightforwardly prohibits states from doing so.

If anything, section 261(c) of the Act specifically permits state commissions to exercise their intrastate authority in a manner that is consistent with the federal regulatory scheme. Section 261(c) specifically provides:

---

[158] *New York*, 267 F.3d at 102 (citing 47 U.S.C. § 251(e)).

[159] *Id.* (quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377).

> (c) Additional State Requirements. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[160]

With this authority, state commissions can further local telecommunications competition as section 271 contemplates and establish intrastate rules that track a BOC's obligations under section 271. Such authority includes ordering just and reasonable rates, terms, and conditions associated with offering section 271 UNEs.

Furthermore, the United States Supreme Court's decision in *Iowa II* supports a determination that no preemption in this instance exists so long as state commissions apply the Commission's just and reasonable standard. Indeed, the Supreme Court found parallel federal and state jurisdiction under section 252 and held that the Commission had the authority to create a pricing methodology that states would apply. In rendering this decision, the Supreme Court endorsed having state commissions continue playing their significant role in the ratemaking process.[161] The Supreme Court explained that "state commissions" participation in the administration of the new *federal* regime is to be guided by federal-agency regulations and that "States will be allowed to do their own thing", however, they must "hew" the lines drawn by the FCC or federal courts.[162]

For the above reasons, the Act and numerous judicial decisions support dual federal and state jurisdiction whereby state commissions apply the Commission's just and reasonable

---

[160] 47 U.S.C. § 261(c).

[161] *Iowa II*, 525 U.S. at 384.

[162] *Id.*, 525 U.S. at 378 n.6.

standard for 271 UNEs. Because of this, the Commission may not alter or disrupt this dual regulatory scheme.

C. Special Access Rates are Unreasonable

Contrary to BOCs' allegations, there is basis for the Commission establishing special access pricing as *per se* just and reasonable. As noted elsewhere in these comments, BOC special access offerings that have qualified for Phase II pricing flexibility are outside of price caps.[163] BOCs are additionally earning unconscionable rates-of-return on special access pricing.[164] Moreover, BOCs are raising prices showing that there is insufficient competition to constrain prices.[165] Therefore, far from assuming that special access pricing is reasonable, the Commission should reject BOC contentions on this point and promptly initiate a proceeding to reform its oversight of special access pricing.

XI. THE COMMISSION SHOULD RESCIND ITS BROADBAND UNBUNDLING RULES OR AT LEAST INITIATE A NEW PROCEEDING TO REASSESS THEM

Despite evidence of CLEC impairment, the *TRO* exempted the incumbents from unbundling certain mass-market "broadband" loop facilities. The exemption was founded not upon a non-impairment finding but on a belief or a hope that the exemption would incent incumbents to build new broadband facilities that would benefit consumers more than would competition. This balancing determination was contrary to the evidence in the record, and in any

---

[163] *Pricing Flexibility Order*, ¶ 69.

[164] *See supra* Section III.B.

[165] *See supra* Section IV.A.1.b.

event the decision to even consider abandoning section 251 was not permitted by the Act.[166] For the reasons set forth in previous CLEC comments to the Commission and their pleadings to the courts, the broadband exemption is unlawful and contrary to the purposes of the Act and should therefore be rescinded.[167]

The purpose of these comments is not to repeat those arguments but to urge the Commission, in the alternative, to at least announce now that it will initiate a new proceeding in 2005 to consider whether the exemption is, as was predicted by the *TRO*, serving the goals of the Act. Decisive and quick Commission leadership will be needed to realize President Bush's goal of "universal, affordable access to broadband technology by the year 2007."[168] The broadband exemption was adopted in February 2003; if two years later the incumbents still have not substantially delivered on their promises of new broadband services *and* lower prices to American consumers, then the Commission must restore competitive access to mass market customers before these markets are completely re-monopolized by the incumbents. And even if the Commission abandons the President's 2007 target and gives the incumbents more time to make good on their promises, the initiation of a toothed review proceeding would accomplish at least one of two worthy objectives – it may further incent the incumbents to deploy broadband

---

[166] Where impairment exists, the Commission can lawfully decline to unbundle only through the forbearance process. *See AT&T v. USTA*, Petition for Writ of Certiorari (June 30, 2004) at 20-21.

[167] The record of the *Triennial Review* demonstrates thoroughly that CLECs are impaired without access to mass-market broadband loops, so if the exemption is rescinded these loops should clearly be restored as UNEs.

[168] Remarks of President George W. Bush at the Homeownership Expo New Mexico, Albuquerque, N.M., March 26, 2004 ("This country needs a national goal for ... the spread of broadband technology. We ought to have ... universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier.").

quickly, or it would at least put them on fair notice that if they fail to do so the Commission will re-order unbundling.

In the absence of such notice from the Commission, the Bell companies might (unreasonably) presume that no consequences will arise from their failure to deliver universal, lower-priced broadband services to consumers. From their promises of video services in the 1980s and early 1990s, to their promises of broadband today, the Bell companies have routinely demanded regulatory relief that it claimed could be justified in light of new Bell commitments, only to respond to such relief with more demands rather than performance of their commitments. In this now-familiar pattern, the Bells have responded to the *TRO* with new petitions for even greater relief, such as a new much broader exemption for fiber-to-the-curb[169] and the elimination of their section 271 obligations to provide access to broadband loops even at "just and reasonable" rates.[170] If those additional exemptions from the Act are granted, the ILECs will surely return with even more requests. Unless the ILECs' feet are finally held to the fire, it is consumers who will continue to get burned.

In judging whether the *TRO*'s broadband exemption could possibly be justified – which in any event the Commenters contest – even under the theory of the *TRO*, the purposes of the Act would demand at a minimum that the supposed new ILEC deployments result not only in wider availability but also lower prices. The President has made clear, as have many commenters in

---

[169] *See* BellSouth Petition for Reconsideration, Docket 01-338 (October 2, 2003) (seeking additional exemptions for fiber to the curb and to multi-dwelling units).

[170] *See* Commission Establishes Comment Cycle for New Verizon Petition for Forbearance from Application of Section 271, Docket 01-338, 18 FCC Rcd 22795, FCC 03-263 (rel. October 27, 2003) (treating Verizon's October 24, 2003 ex parte letter seeking forbearance from application of § 271 obligations to certain mass market broadband loops as a new petition for relief).

past Commission proceedings, that the availability of competitive alternatives and lower broadband prices are critical to broadband's success.[171] Lower prices have been the key driver of the much higher broadband adoption rates in such countries as South Korea, Japan, and Canada,[172] and are an explicit and fundamental goal of the Act.[173] The success of the *TRO*'s broadband exemption must therefore be judged not only on broadband deployment but also on broadband prices and adoption. If it becomes apparent that the *TRO*'s broadband exemption is not delivering lower broadband prices to American consumers, it cannot be deemed to satisfy the Congressional mandate of the Act. In that event, if not sooner, the Commission should return to Congress' leading formula for lower consumer prices – competition brought about through selected access to incumbent networks.

---

[171] Remarks of President George W. Bush at the Homeownership Expo New Mexico, Albuquerque, N.M., March 26, 2004. ("The more the price goes down, the more users there will be."); see also *See, e.g.*, Remarks of Chairman Powell, October 25, 2001 ("the intriguing statistic is that though [85%] of households have [broadband] availability, only 12% of these households have chosen to subscribe. There are many possible reasons for the demand gap. Consumers may not yet value the services at the prices they are being offered.") *available at* http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html; *see generally* CC Docket 02-33, Comments of Consumer Federation of America (May 3, 2002); Comments of the California Internet Service Providers Association at 65-66.

[172] As the Commission is well aware, the United States is not in the top 10 nations for broadband penetration. U.S. penetration rates have long been less than half of South Korea's, but now have fallen behind not only the East Asian leaders but also approximately 50% behind such countries as Canada, Denmark, Holland and Switzerland. *See. e.g.*, World Broadband Statistics, Q2 2004, issued September 23, 2004, http://www.point-topic.com/content/dslanalysis/Q2+04+numbers+analysis.htm, at Figure 9 (Top Ten Countries by Broadband Penetration). While South Korea has 24 broadband lines per 100 residents and Canada 16, the United States has less than 10 lines per 100), in significant part because of higher prices. The International Telecommunications Union recently echoed this conclusion, finding that "Prices play perhaps the most important role in promoting broadband demand. Successful broadband economies are characterized by low prices—typically as a result of flourishing competition and innovative pricing schemes that attract a wide variety of customers." *See* International Telecommunications Union Internet Reports, *Birth of Broadband* (September 2003), Executive Summary at § 6, http://www.itu.int/osg/spu/publications/sales/birth ofbroadband/-exec_summary.html (viewed September 28, 2004).

[173] *See* Preamble of the 1996 Act ("AN ACT: To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

The negative consequences of the broadband exemption could grow exponentially in the coming years as the incumbents are able to move an ever-increasing percentage of their network into exempted categories. Therefore, although competition already is being suppressed by the exemption, in the near-term the Commission has an opportunity to review and modify its policy before the downsides of the exemption have fully taken hold. Therefore, if the Commission does not now rescind its mass-market broadband exemptions, its order in this proceeding should announce a new reassessment of their effectiveness in promoting the availability of lower broadband prices and higher-quality broadband services for American consumers.

XII. THE PROPOSED TRANSITION MECHANISM IS UNREASONABLY SHORT

A. Six Months Is Not Necessarily a Reasonable Transition Period

The *Interim UNE Order* correctly recognized a need for a transition period following the "interim period" (*i.e.*, the six months following the expiration of the interim requirements on the earlier of six months after Federal Register publication of the *Interim UNE Order* or the effective date of the Commission's final unbundling rules), whereby in the absence of a Commission finding that that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, ILECs must continue providing CLECs with access to these UNEs at TELRIC preferential pricing.[174] The Commission's reasoning for creating this transition period is to guard "[a]gainst the precipitous rate increases that might otherwise result."[175] However, the Commission arbitrarily proposed to set this transition period at 6 months for all UNEs.

---

[174] *Interim UNE Order*, ¶ 29.

[175] *Id.*

In final rules, instead of this undifferentiated approach, the Commission should establish transition periods for each UNE as appropriate. For example, more time may be required for CLECs to substitute alternative dark fiber providers than for DS3 transport. The Commission itself has noted that it takes between six and nine months to deploy fiber loops, but longer periods, such as a 12-month period would be more reasonable.[176] Thus, for example, where dark fiber has been eliminated for a customer location and there are no other wholesale alternatives for such site, the Commission should permit CLECs to continue receiving dark fiber at TELRIC prices for 12 months after a finding of non-impairment. The transition for routes where DS3 transport is no longer available and on which dark fiber is also not available should also be 12 months because competitors would need to build new facilities on such routes. The Commission should establish transition periods for each UNE tied to a realistic time period for each element and a minimum set a 9 month transition period.

B. ILECs Should Be Required to Provision New Orders During a Reasonable Transition Period

The Commission should also provide that ILECs must provision new orders at TELRIC prices during the transition period. It stands to reason that if it is reasonable to afford CLECs a reasonable transition period for a UNE then it is reasonable to assume that they could serve new customers without the UNE only after the transition period has expired. This will not impose a significant burden on ILECs especially given that TELRIC pricing would terminate at the end of the transition period. This will also "mitigate the rate shock that could be suffered by competitive LECs" if required to pay non-cost-based prior to when they can reasonably be

[176] *TRO*, ¶ 304.

expected to have implemented non-UNE provisioning alternatives.[177] Accordingly, Commenters urge the Commission to provide that ILECs are required during the transition period to provision new orders as UNEs

C. Qwest's Petition should be Denied

The Commission incorporated into the record a petition for rulemaking filed by Qwest to adopt interim unbundling rules following the *USTA II* decision.[178] Qwest proposes a set of interim rules, including pricing limitations, for unbundled switching, shared transport, dedicated transport, and enterprise loops for the time period between vacatur of some of the Commission's unbundling rules under *USTA II* and adoption of final unbundling rules.[179] While Qwest advocates for establishing interim rules up to December 31, 2006,[180] Qwest proposes, in effect, to immediately impose special access prices for dedicated transport and DS1 and DS3 loops. While the Commission's own proposal for interim rules implicitly rejects the Qwest proposal, Commenters reiterate that special access pricing is not acceptable for a number of reasons either as interim or permanent rates. Accordingly, the Commission should reject the Qwest petition.

---

[177] *Interim UNE Order*, ¶ 30.

[178] *See Interim UNE Order*, ¶ 14; *see also* Petition of Qwest Communications International Inc. for Rulemaking (filed March 29, 2004).

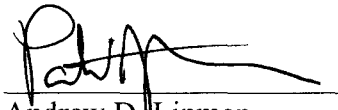
[179] *Id.* at 4-6.

[180] *Id.* at 6.

XIII. CONCLUSION

Commenters request that the Commission conclude this proceeding, in accordance with the recommendations herein, at the earliest possible date.

Respectfully submitted,



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Counsel for
ATX Communications, Inc.
Blackfoot Communications, Inc.
Freedom Ring Communications, L.L.C. d/b/a BayRing Communications
CTC Communications Corp.
Focal Communications Corporation
Globalcom, Inc.
Lightship Telecom, Inc.
Mpower Communications Corp.
Ntelos, Inc.
OneEighty Communications, Inc.
RCN Telecom Services, Inc.
TDS Metrocom, LLC

October 4, 2004

ATTACHMENT A

Declaration of Mark A. Jenn, TDS Metrocom, LLC

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

Declaration of Mark A. Jenn

I, Mark A. Jenn, pursuant to 28 U.S.C. Sec. 1746 do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed as Manager - Federal Affairs by TDS Metrocom, LLC.

2. My business address is 525 Junction Road, Suite 6000, Madison, WI 53717-2105.

3. TDS Metrocom is a competitive local exchange carrier providing service in Illinois, Michigan and Wisconsin and as USLink d/b/a TDS Metrocom (USLink) in Minnesota and North Dakota. (Collectively, TDS CLECs) The TDS CLECs are wholly owned subsidiaries of TDS Telecom. TDS Telecom also owns and operates rural, incumbent local exchange carriers in 28 states. TDS Telecom is itself a wholly owned subsidiary of Telephone & Data Systems, a publicly-owned holding company that trades on the American Stock Exchange under the symbol TDS.

4. The purpose of this Affidavit is to provide information relevant to the FCC's proceeding reviewing ILEC unbundling obligations. The statements below will provide evidence showing that it is imperative that the TDS CLECs continue to have access to UNEs, that alternatives to ILEC provisioning of these elements are minimal in some areas and completely nonexistent in most others, that the TDS CLECs would be seriously impaired in its ability to provide service without critical UNEs such as high capacity loops, interoffice transport and Enhanced Extended Links (EELs). Further restricting unbundling requirements would undermine the TDS CLECs access to the customer, stifle innovation in new products and services and jeopardize the long-term viability of the facilities-based competitive model.

5. TDS Metrocom and USLink serve both residential and business customers in mostly small to medium-sized markets with 10,000-100,000 residents as well as the suburban fringe of a number of major metropolitan areas. The TDS CLECs offer customers a full range of products including local and long distance voice, dial-up Internet access, custom calling features, voice mail, DSL and other data products, among other things. Through the use of innovative pricing and bundling of products and services the TDS CLECs have grown to nearly 400,000 lines of which nearly 135,000 belong to residential voice and DSL customers.

6. The TDS CLECs use a mix of their own facilities and UNEs to provide service in chosen markets. Self-provisioned facilities include 8 Class 5 switches, over 120 collocation sites, most with DSL capability, fiber transport and/or SONET rings in selected markets and limited facilities built directly into customer premises.

7. The TDS CLECs are fully funded through internal sources by a corporate parent, Telephone & Data Systems. While such internal funding has provided insulation from excessive market volatility, the company's internal investors are no less demanding than outside investors. With cellular, ILEC, CLEC and international holdings (and previously paging and PCS holdings), the management of Telephone & Data Systems has numerous alternatives for its capital investment funds. Accordingly, with every request for funding to enter a new market or expand facilities, the TDS CLECs must develop rigorous 10-year financial plans that provide a clear blueprint for future profitability. Based on these approved business plans, the TDS CLECs have already invested over $300 million in facilities with each and every foray being cost-justified.

8. The result of the careful planning process described above has been targeted investment and overbuilding of the ILEC network only is cases where it was economically rational to do so. Because of limited resources for investment, but with the desire to serve any and all customers in each market entered, there is obviously a need to find alternative sources to reach customer premises and to link collocation sites to the TDS CLEC switches. Extensive research has been done to identify all potential sources for these facilities. Unfortunately, the results of ongoing research continue to be the same - while options exist over a few selected transport routes and to a very small number of buildings, the only carrier with anything even close to ubiquitous coverage is the ILEC. Wireless local loop and wireless broadband alternatives are too costly, are not available in TDS CLEC markets, do not provide a platform robust enough for the products and

services the TDS CLECs offer and are not yet ready for widespread deployment. This is particularly true for wireless replacements capable of serving the small to medium sized business market.

9. Furthermore, a wholesale market for alternative wireline loop facilities does not exist. Outside of the downtown areas of major metropolitan areas, the TDS CLECs have found no evidence of any carriers offering wholesale access to loop facilities. Even if such a wholesale carrier did exist, the coordination of ordering from multiple loop vendors whose coverage is sporadic at best would be cost and time prohibitive. Therefore, because of the lack of adequate third party alternatives to the ILEC network in the TDS CLEC's markets, not a single loop to an end user has been provisioned through a third party vendor. ILEC loops continue to be the only available link to the vast majority of current and prospective customers, especially at the single DS3, DS1 and DS0 levels.

10. With respect to self provisioning, many of the locations where the TDS CLECs have facilities directly into a customer premise are buildings owned or leased by company affiliates - TDS Metrocom, USLink, TDS Telecom, US Cellular and Telephone & Data Systems corporate headquarters, call centers, data centers and other buildings. The investment in these facilities could be justified because stable long-term customers with known revenue streams were located at the site. The extremely unique circumstances surrounding the viability of alternative loop deployment points to the need for a location by location analysis of alternatives. In many cases, apparently similar buildings located next to each other have extremely different customer characteristics (several small tenets versus a single

large corporate customer) and revenue opportunities (high technology, data intensive firms versus tenets with few telecommunications demands). One may allow for potential facility overbuilding while the other may never present an opportunity for efficient competitive facility entry.

11. Even for the largest business customers who use high capacity loops, overbuilding is inefficient except in very limited circumstances and only at the highest OCn capacity levels. It is important to note that the TDS CLECs have never self-provisioned loop facilities at a DS1 or single DS3 level and only in rare cases has self-provisioning been justified at a multiple DS3 level. Furthermore, at locations where the TDS CLECs have overbuilt local loops at extremely high capacity levels, the TDS CLECs do not offer wholesale access to these facilities. The costs of developing the systems and processes necessary to facilitate a wholesale product are prohibitive when viewed in relation to the small number of locations where overbuilding has occurred.

12. Overall, the TDS CLECs serve only 2.4% of lines completely over self-provisioned facilities. That percentage continues to decrease over time as it becomes more and more difficult to justify self-provisioning because of capital constraints and limits on revenue potential due to both regulatory actions (such as reciprocal compensation and CLEC access charges) and competitive pricing pressures. Couple that with the fact stated above that many of TDS CLEC's largest business customers are company affiliates and one can see that self-provisioning accounts for a minimal amount of necessary loop facilities.

13. Access to ILEC loop facilities as UNEs is therefore critical to the success of the TDS CLEC. Alternative technologies are not ripe for large scale deployment and cannot address the needs of small to medium-size business customers, wholesale markets for loops, even high capacity loops, do not exist and self provisioning can only be justified in few unique situations.

14. Similarly, the alternatives available with respect to interoffice transport are limited. In areas where there is a large customer base, self provisioning interoffice transport facilities to link various ILEC central offices with TDS CLEC switches has been cost justified once traffic levels become high enough. TDS CLECs have found that it can cost up to $20-$30 per foot and up to $150,000 per mile to lay fiber. Added to that is the cost of obtaining franchise or right of way agreements which can be as high as $10,000 and ongoing right of way use fees that in some cases have been as high as $0.20-$0.30 per foot, per year. This presents a significant hurdle that must be overcome to recoup investment in facilities. Therefore, there are many areas where self provisioning interoffice transport is clearly inefficient and uneconomical. Wire centers with a low level of density and traffic do not justify deployment. Nor do areas where expected market penetration is small. This is especially true in the tier 2 and 3 markets where the TDS CLECs generally operate. For the same reason, most of the transport routes in TDS CLEC markets do not lend themselves well to the existence of a viable wholesale transport market. Traffic levels, geographic distances and coordination problems all hinder the development of a wholesale market. Thus, the only economically efficient course is to use ILEC transport

UNEs instead of duplicating facilities and stranding investment by all carriers along such routes.

15. Additionally, loop and transport combinations are critical the success of the TDS CLECs because it is economical impossible to build widespread regional network footprints identical to those of the RBOCs. This is particularly pertinent in areas such as the suburban fringe of major metropolitan areas. In order to serve multi-location business with integrated voice and data products that they require of telecommunications providers, access to high capacity EELs is the only way competitors can address that market. Any carrier who does not duplicate the ILEC footprint is as a permanent disadvantage in this market.

16. Continued access to EELs is also important in the face of the FCC's decision in the TRO to eliminate unbundled local switching for enterprise customers. USLink had used enterprise switching in many areas to fill out coverage gaps and as a precursor to facilities deployment. With its elimination the majority of those customers have been moved to EELs that connect to USLink collocation or switching facilities in distant locations. Restrictions on the use of EELs either through limits on interoffice transport availability or high capacity loops would force USLink to abandon those customers and market areas served initially by enterprise switching and now via EELs.

17. The result of Commission action to reduce the current list of UNEs or place restrictions on how facilities can be used would be a detriment to customers everywhere. TDS CLEC entry into the market has proven that competition spurs innovation through its deployment of facilities and services. TDS CLEC market

entry forces the ILEC to respond with changes to its product offerings and acceleration of its technology deployment. As TDS Metrocom deployed DSL and service bundles with features like unlimited local calling, the ILEC responded in kind by investing more in facilities and promoting relatively hidden service bundles. The TDS CLECs are now responding by altering product offerings to be more competitive. This cycle of innovation was the goal of the 1996 Telecom Act and is occurring, albeit on too limited a scale. However, only with adequate access to UNEs has this occurred and will it continue to occur and expand in the future.

18. This concludes my Declaration

Executed this 4th day of October, 2004

Mark A. Jenn

ATTACHMENT B

Declaration of Brent L. Johnson, OneEighty Communications, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

Declaration of Brent L. Johnson

I, Brent L. Johnson, pursuant to 28 U.S.C. Sec. 1746 do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed by OneEighty Communications, Inc. ("OneEighty") as Executive Vice President and Chief Operating Officer. I also serve as the Chairman of the Board of Directors. My business address is 206 North 29th Billings, MT 59101.

2. As the Chief Operating Officer I am responsible for the overall commercial aspects of the company, including specifically finance and accounting, regulatory and legal affairs, sales and customer care. I have a BS in Industrial Engineering from Stanford University and am a graduate of the

Program for Management Development from the Harvard University Graduate School of Business. I have more than twenty years of experience in senior business management. I have held several business planning positions with Avista Communications of Montana and Wyoming and their predecessor company Western Technology Partners since 1998. Prior to assuming my role with Avista Communications of Montana and Wyoming, I served as Vice President of Business Development and Chief Financial Office for Big Sky Airlines, President and General Manager for SafteyMaster Corporation, and held positions with Oil Dynamics, Baker International and Amoco Production Company.

3. OneEighty is a facilities-based competitive local exchange carrier providing voice and broadband data services including data transport, Internet access, voice services and enhanced telecommunications solutions to customers in rural markets in Billings and Bozeman, Montana, Cody, Wyoming and the surrounding areas. OneEighty is building and managing its own fiber optic network and has installed its own facilities in the markets it serves; however, it relies heavily upon leasing certain facilities from Qwest, the ILEC in OneEighty's territory, in order to provide service to its customers. OneEighty Communications focuses on small- and medium-sized businesses in communities with populations under 100,000 - communities that have typically been under-served by ILECs.

4. The purpose of this declaration is to provide information relevant to the FCC's proceeding reviewing ILEC unbundling obligations. The statements below will provide evidence showing that alternatives to ILEC provisioning of these elements are nonexistent in the markets we serve.

5. OneEighty uses various UNEs, including DS0 and DS1 loops andDS1 and DS3 transport to provide service to many of its customers. OneEighty is economically unable to self-deploy single DS1 capacity loops to a majority of its customers, and there are no wholesale alternatives for serving customers at the DS1 level. Indeed, OneEighty has found no evidence of any carriers offering wholesale access to loop facilities in our markets other than Qwest. OneEighty has looked extensively in its service area for providers other than Qwest; however, we have been unable to find any alternative providers. In addition, OneEighty has explored alternative technologies to wireline facilities, including fixed wireless solutions with companies like USA Digital and TransAria; however, such alternatives have not been successful for various reasons, including inadequate line of sight for the relevant facilities and field-testing of the solutions demonstrated that they were unreliable. OneEighty also has explored obtaining facilities from cable providers; however, to date, these providers have been unwilling to lease facilities to OneEighty.

6. Even if such wholesale carriers existed, the coordination of ordering from multiple loop vendors whose coverage is sporadic at best would be

costly and time prohibitive. Therefore, because of the lack of available third party alternatives to the Qwest network in OneEighty's markets, OneEighty has not provisioned a single loop to an end user through a third party vendor. Qwest's loops continue to be the only available link to the vast majority of current and prospective customers, especially at the single DS0, DS1 and DS3 levels.

7. It does not make economic sense for OneEighty to construct and self-deploy its own DS1 or lower capacity loops because OneEighty's customers who demand these services over DS1 loops possess significantly different economic characteristics than large enterprise market customers. Specifically, small and medium sized enterprise customers served by DS1 loops do not provide OneEighty with same potential revenue derived from large enterprise market customers. Furthermore, these customers tend to resist long-term contract obligations and are more likely than enterprise customers to change carriers frequently. As such, the potential churn from these customers makes it difficult for OneEighty to rely on this revenue stream to achieve acceptable financial returns on the capital investment required for self-deployment. Furthermore, OneEighty faces other economic and operational barriers in self-deploying loops, especially DS3 loops. These barriers include difficulties in acquiring municipal and private rights-of-ways as well as gaining building access from owners of multiunit premises. Moreover, unlike an OC3 loop, a single DS3 loop can not provide sufficient revenue to overcome these barriers. Since the Commission's

impairment analysis rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, CLECs, like OneEighty, are still impaired without access to DS3 loops due to their inability to recover such costs at the DS3 level.

8. Access to ILEC loop facilities as UNEs is therefore critical to the success of OneEighty. Alternative technologies are not ripe for large-scale deployment and cannot address the needs of small to medium-size business customers. Moreover, wholesale markets for loops, even high capacity loops, do not exist and self-provisioning can only be justified in limited select situations, few of which exist in OneEighty's markets.

9. Additionally, loop and transport combinations are critical to OneEighty's success because it does not have, nor can it ever reasonably expect to have identical, widespread regional network footprints. This is particular pertinent in the rural areas that OneEighty serves. In order to serve multi-location businesses and rural customers with required integrated voice and data products, access to high capacity EELs is the only way competitors like OneEighty can address that market. Any carrier who does not duplicate the ILEC footprint is at a permanent disadvantage in this market. Continued access to EELs also is important in the face of the FCC's

decision in the TRO to eliminate unbundled local switching for enterprise customers. Restrictions on the use of EELs either through limits on interoffice transport availability or high capacity loops would force companies like OneEighty to abandon those customers and market areas served by EELs.

10. The result of Commission action to reduce the current list of UNEs or place restrictions on how facilities can be used would be a detriment to customers everywhere, including OneEighty's customers in Montana and Wyoming.

11. This concludes my Declaration.

Executed this 4th day of October, 2004

Brent L. Johnson
Chief Operating Officer
OneEighty Communications, Inc.

ATTACHMENT C

Declaration of Steven A. Wengert, BayRing Communications

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

Declaration of Steven A. Wengert

1. I am employed with Freedom Ring Communications L.L.C., d/b/a BayRing Communications ("BayRing"). My business address is 359 Corporate Drive, Portsmouth, NH. 03801-2888.

2. I have a BS in Accounting from New Hampshire College. I am currently pursuing an MBA from Southern New Hampshire University. I have over 10 years experience in Operations/Cost Management, over 6 years in Manufacturing as a Controller/GM and 4 years in telecommunications, with BayRing. I also have a background from the US Navy, in Nuclear and Electrical Engineering.

3. As Director of Operations, I am responsible for the day to day operations of the company. This includes overseeing the provisioning and delivery of all network services. I oversee the network and the on-going build out of all facilities, and the overall interaction with Verizon in BayRing's collocations in Verizon's central offices.

4. BayRing is a facilities-based Competitive Local Exchange Carrier ("CLEC") currently providing service principally in New Hampshire, but also to a much lesser extent in Massachusetts and Maine. BayRing was the first CLEC to be certified to operate in New Hampshire and Maine, and the first to enter into an interconnection agreement in those states with Verizon's predecessor. BayRing's customer base is approximately 98% business and 2% residential. BayRing's product offerings include local and long distance voice, dial-up Internet access, custom calling features, voice mail, DSL, collocation and other data products, among other things.

5. The purpose of this declaration is to provide information relevant to the FCC's proceeding reviewing ILEC unbundling obligations. The statements below will provide evidence showing that it is imperative that BayRing continues to have access to UNEs, that alternatives to ILEC provisioning of these elements are minimal in some areas and completely nonexistent in others, and that BayRing would be seriously impaired in its ability to provide service without critical UNEs such as high capacity loops, interoffice transport and Enhanced Extended Links (EELs). Further restricting unbundling requirements would undermine BayRing's access to the customer, stifle innovation in new products and services and jeopardize the long-term viability of the facilities-based competitive model.

6. BayRing uses a mix of its own facilities and Verizon's UNEs to provide service in its markets. Self-provisioned facilities include a Class 5 switch located in Portsmouth, NH, 13 collocation sites (12 in New Hampshire and one in Massachusetts), all with DSL capability, fiber transport and/or SONET rings in selected markets, and limited facilities built directly into customer premises.

7. BayRing is a small regional carrier that has enjoyed substantial expansion as a result of focused customer service and a conservative fiscal growth strategy. BayRing's business strategy has been to enter new markets only after it has achieved operational and financial success in existing markets. Moreover, when BayRing enters a new market, it does not make substantial investments in facilities dedicated to that market until it has built up a critical mass of customers to support those facilities. In contrast, many of its competitors with much greater financing have expanded on speculation that substantial investments that are made before customers have been signed will eventually turn profitable. Those competitors have, in virtually every case, been forced into bankruptcy. Thus, before BayRing undertakes any capital investment, it must undertake a careful planning process in which it can have a high degree of confidence, based on a known customer base, that an investment in facilities is likely to prove profitable.

8. The result of this process has been targeted investment and overbuilding of the ILEC network only in cases where it was economically rational for BayRing to do so. Because of limited resources for investment, but with the desire to serve any and all customers in each market entered, there is obviously a need to find alternative sources to reach customer premises and to link collocation sites to BayRing's switch. BayRing has performed extensive research to identify all potential sources for these facilities. Unfortunately, the results of ongoing research continue to be the same - while options exist over a few selected transport routes and to a very small number of buildings, the only carrier with anything even close to ubiquitous coverage is Verizon. By way of example, out of the 117 wire centers in New Hampshire, alternate transport (via NEON Communications) is only available between five of these wire centers and is limited to DS3 and above. Wireless local loop and wireless broadband alternatives are too costly, are not

available in BayRing's markets, do not provide a platform robust enough for the products and services the BayRing offers, and are not yet ready for widespread deployment. This is particularly true for wireless replacements capable of serving the small to medium sized business market.

9. Furthermore, a wholesale market for alternative wireline loop facilities does not exist. In its markets, BayRing has found no evidence of any carriers offering wholesale access to loop facilities. Even if such a wholesale carrier did exist, the coordination of ordering from multiple loop vendors whose coverage is sporadic at best would be cost and time prohibitive. Therefore, because of the lack of adequate third party alternatives to the Verizon network in BayRing's markets, BayRing has not provisioned a single loop to an end user through a third party vendor. Verizon loops continue to be the only available link to the vast majority of current and prospective customers, especially at the single DS3, DS1 and DS0 levels.

10. BayRing has self-provisioned its own DS1 and DS3 loops wherever the economics have warranted it. We would much prefer to be using our own facilities, and it is an excellent selling point with prospective customers, many of whom have been dissatisfied with the quality of Verizon's facilities and service. Unfortunately, the economics warrant self-provisioning loops (overbuilding Verizon's network) only in the most limited circumstances, specifically where our investment in these facilities could be justified because stable long-term customers with known revenue streams were located at the site.

11. Self-provisioned loops represent only approximately 5% of all DS0 equivalent loops that BayRing uses to serve its customers. These are in areas of Portsmouth in which BayRing already had built up a substantial concentration of customers in a small geographic area by leasing Verizon's loops (mostly DS1 loops). If we had not been able to build up this

concentration of customers over a period of several years by leasing Verizon's DS1 loops, we would never have been able to make the transition to building our own loops.

12. One of the reasons that it is so difficult to overbuild without first having had access to ILEC loops is the timing factor. Prospective customers are generally interested in getting alternative service some time in the next 30 days, but it takes around a year to perform an overbuilding project. This is because it is necessary to get obtain (at substantial expense) access to Verizon owned or licensed poles and conduit, as well as building access, access to rights of way, and franchising. So without the availability of unbundled loops with which to build up a critical mass of customers in one small location as a "bridge" to overbuilding, a CLEC would have to undertake an overbuilding project on complete speculation. Then, once it was ready to offer service, it would find that many customers are tied up with long-term commitments to the ILEC, so the number of customers who are available to switch to the CLEC's overbuilt service at any one time is quite small.

13. The extremely unique circumstances surrounding the viability of alternative loop deployment points to the need for a location by location analysis of alternatives. In many cases, apparently similar buildings located next to each other have extremely different customer characteristics (several small tenants versus a single large corporate customer) and revenue opportunities (high technology, data intensive firms as compared with tenants with few telecommunications demands). One building may allow for potential facility overbuilding while the other may never present an opportunity for efficient competitive facility entry.

14. Even for the largest business customers who use high capacity loops, overbuilding is inefficient except in very limited circumstances and only at the highest OCn capacity levels. Furthermore, at locations where BayRing has overbuilt local loops at extremely high capacity

levels, BayRing does not offer wholesale access to these facilities. The costs of developing the systems and processes necessary to facilitate a wholesale product are prohibitive when viewed in relation to the small number of locations where BayRing has overbuilt.

15. Overall, BayRing serves only approximately 5% of lines completely over self-provisioned facilities (excluding lines serving an affiliate located within one of BayRing's central offices). Couple that with the fact stated above that BayRing would not even have been able to build to these customers economically if it could not first serve them with unbundled loops and it becomes obvious that self-provisioning by itself will not bring competitive alternative to the monopolist to many customers.

16. BayRing uses special access circuits instead of to a very limited degree. It uses them in only two circumstances: (1) when Verizon rejects a UNE order, claiming that "no facilities" exist. BayRing then orders a special access circuit, which it converts to a UNE after Verizon's minimum 3-month period for conversion and (2) if the customer request the line be delivered to a specific suite or location in the building as opposed to the building point of demarcation. This is because Verizon will not deliver a loop to a specific suite, only to the point of demarcation. BayRing does not use special access circuits more widely because the pricing makes them uneconomic except as a short-term transition device.

17. Access to ILEC loop facilities as UNEs is therefore critical to the success of BayRing. Alternative technologies are not ripe for large scale deployment and cannot address the needs of small to medium-size business customers, wholesale markets for loops, even high capacity loops, do not exist and self provisioning can only be justified in few unique situations.

18. Similarly, the alternatives available with respect to interoffice transport are limited. Self provisioning interoffice transport facilities to link various ILEC central offices with

BayRing's switch is cost-justified only when traffic levels become high enough. In a relatively sparsely populated state like New Hampshire, this is difficult, if not impossible, to achieve. For example, last year, we received a bid for installing fiber in 4" conduit of more than $168,000 per mile, not including the costs of right of way permitting, police details or flaggers that may be required, or the fiber itself. This presents a significant hurdle that must be overcome to recoup investment in facilities. Therefore, there are many areas where self provisioning interoffice transport is clearly inefficient and uneconomical. Wire centers with a low level of density and traffic or where expected market penetration is small do not justify deployment, as we have calculated that we would need an OC12 level of traffic to make self-provisioning of interoffice transport economically feasible. This is especially true in the tier 3 markets where BayRing operates.

19. For the same reason, most of the transport routes in BayRing's market area do not lend themselves well to the existence of a viable wholesale transport market. Traffic level, geographic distances and coordination problems all hinder the development of a wholesale market. Again, we have investigated the availability of alternative providers of interoffice transport throughout New Hampshire, and have found availability (generally only from a single alternative provider, Neon) in only 5 of Verizon's 117 New Hampshire wire centers.

20. Thus, the only economically efficient course is to use ILEC transport UNEs instead of duplicating facilities and stranding investment by all carriers along such routes. If Verizon's interoffice transport were made unavailable to BayRing as UNEs, BayRing would likely have to abandon 7 out of its 12 New Hampshire collocations and close to half of its customers, thus stranding considerable investment. Even if an existing CLEC, which would

have to treat its investment as a sunk cost, were to stay in the market, no new CLECs would expand to an ILEC central office that is not served by competitive transport at a reasonable price.

21. Additionally, loop and transport combinations are critical to the success of BayRing because we do not have nor can ever reasonable expect to have identical, widespread regional network footprints. This is particular pertinent in suburban and rural areas. In order to serve multi-location business with integrated voice and data products that they require of telecommunications providers, access to high capacity EELs is the only way competitors can address that market. Any carrier who does not duplicate the ILEC footprint is as a permanent disadvantage in this market. Continued access to EELs is also important in the face of the FCC's decision in the TRO to eliminate unbundled local switching for enterprise customers. Restrictions on the use of EELs either through limits on interoffice transport availability or high capacity loops would force BayRing to abandon those customers and market areas served by EELs.

22. The result of Commission action to reduce the current list of UNEs or place restrictions on how facilities can be used would be a detriment to customers everywhere. BayRing's CLEC entry into the market has proven that competition spurs innovation through its deployment of facilities and services. The entry by BayRing and other CLECs has forced Verizon to respond with changes to its product offerings and acceleration of its technology deployment. As BayRing deployed an array of aggressively priced voice and data products, Verizon responded in kind by investing more in facilities and promoting service bundles that did not exist prior to the advent of competition. BayRing is now responding by altering its own product offerings to be more competitive. This cycle of innovation was the goal of the 1996

Telecom Act and is occurring, albeit on too limited a scale. However, only with adequate access to UNEs has this occurred and will it continue to occur and expand in the future.

23. In talking with customers and prospective customers, we learn that there is a tremendous demand for service that is truly alternative to Verizon. By deploying our own switches in conjunction with Verizon's unbundled loops and transport, we and other CLECs are meeting a portion of that demand today. If access to the ILEC's DS1 and DS3 loops and transport at cost-based pricing were taken away, the losers would be not only the CLECs that have made these investments, but more importantly, the customers—including customers that have stayed with the ILECs—and may have benefited from better service, more innovative products and packages, and lower prices that has resulted from this facilities-based competition.

24. This concludes my Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 4, 2004

Steven A. Wengert